Supreme Court, U.S.
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06-6 No. _____

In The
Supreme Court of the United States

CAN-AM INTERNATIONAL, L.L.C.,

Petitioner,

v.

THE REPUBLIC OF TRINIDAD AND TOBAGO;
THE TOBAGO HOUSE OF ASSEMBLY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the foreign defendants waive the right to assert sovereign immunity under 28 U.S.C. §1605(a)(1) of the Foreign Sovereign Immunity Act where they expressly waived such immunity?

Did the foreign defendants waive the right to assert sovereign immunity under 28 U.S.C. §1605(a)(2) where the plaintiff acted as the defendant's agent-in-fact while conducting commercial activity in the United States and was directly affected?

LIST OF PARTIES

Petitioner is Can-Am International, L.L.C.

Respondents are the Republic of Trinidad and Tobago and the Tobago House of Assembly.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Can-Am International, L.L.C. is a privately owned limited liability company organized in the State of Texas. None of its ownership interest is owned by a publicly traded corporation.

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PETITION FOR WRIT OF CERTIORARI

Can-Am International, L.L.C., is an American Company organized in the state of Texas. Laura Lee Sorsby is its founder and CEO. Ms. Sorsby has extensive experience with international financing arrangements. The Republic of Trinidad and Tobago ("T&T") is comprised of two islands in the Caribbean near Venezuela. At the request of T&T, Ms. Sorsby, as CEO of Can-Am, submitted her credentials. With knowledge that Can-Am was an American Company and operated in the United States, T&T, through its legislative body the Tobago House Assembly (THA), appointed Ms. Sorsby as that Government's agent for the solicitation of funding for various projects on the islands. Can-Am was to receive a 10% commission as compensation for securing funding.

While acting as T&T's agent, Can-Am secured several funding program proposals all of which were rejected by the Government. Finally, T&T accepted a funding proposal and, through its Chief Secretary, Hochoy Charles, the highest government official in charge of Finance (akin to our U.S. Secretary of the Treasury), signed an irrevocable pay order which included an express waiver of immunity. Ultimately, the Government reneged on the funding project leaving Can-Am uncompensated for years of efforts on behalf of the Government.

Can-Am sued T&T and its governing body the THA in the district court for breach of contract, fraud, negligent misrepresentation, promissory estoppel and quantum meruit. T&T and THA (collectively "the T&T Government") raised the defense of foreign immunity

under 28 U.S.C. §§1602, *et seq.* and the district court dismissed the suit on those grounds.

OPINIONS AND ORDERS BELOW

The U.S. Court of Appeals for the Fifth Circuit denied Petitioners Panel Petition for Rehearing in this case and its order is unpublished. (App. C). The Fifth Circuit Court of Appeals opinion affirming the district court decision is unpublished. (App. A). The district court is the United States Southern District of Texas and its opinion is unpublished. (App. B).

JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit of March 15, 2006. The Fifth Circuit denied a petition for rehearing on March 30, 2006. (App. C). The U.S. Supreme Court has jurisdiction to review cases from federal courts of appeals by virtue of 28 U.S.C. §1254(1) (2000).

FEDERAL STATUTES INVOLVED

This Petition involves questions involving a number of aspects of foreign sovereign immunity as prescribed by Congress under the Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§1602, *et seq.* In particular, at issue in this petition is the "waiver of immunity exception"

and the "commercial activity exception" promulgated at 28 U.S.C. §1605(a)(1-2).

STATEMENT OF THE CASE

As this Court has consistently observed, Congress legislated the 1976 Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§1602, *et seq.*, in order to "remedy [then existing] problems [with civil actions involving foreign sovereigns as defendants] by enacting . . . a comprehensive statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.'" *Republic of Austria v. Altmann*, 124 S.Ct. 2240, 2249 (2004) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983)); *First Nat'l City Bank v. Banco Para el Comercio de Cuba*, 462 U.S. 611, 622 n.11 (1983) (noting that "[w]hen it enacted the FSIA, Congress expressly acknowledged the importance of developing a uniform body of law concerning the amenability of a foreign sovereign to suit in United States courts") (quotation omitted). The FSIA not only defines foreign sovereigns and their agencies and instrumentalities, *see* 28 U.S.C. §1603; it also establishes rules as to the exceptions to immunity of foreign sovereign defendants, *see* 28 U.S.C. §1605.

Where the underlying cause of action falls within any of the clearly-enumerated exceptions provided for in the Act, *see* 28 U.S.C. §1605, a foreign sovereign defendant is subject to the jurisdiction of courts in the United States. Among these exceptions are cases involving a foreign

sovereign's waiver of immunity, *see* 28 U.S.C. §1605(a)(1) or commercial activities, *see* 28 U.S.C. §1605(a)(2).

In this case, the T&T Government expressly waived sovereign immunity by entering into an irrevocable pay order. In addition, the T&T Government appointed Ms. Sorsby, as CEO of Can-Am, their agent to procure commercial funding opportunities for projects in T&T with full knowledge that she conducted her business in the United States and her company, Can-Am, was formed in the State of Texas.

REASONS FOR GRANTING THE PETITION

As this Court has previously noted the FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). As a consequence, the FSIA is an extensively litigated statute, with hundreds of cases decided each year in which a citizen brings suit against a foreign state, or an agency or instrumentality of a foreign sovereign.

It is for these reasons that this Court, in the wise exercise of its plenary review powers, has recently addressed issues of interpretation and application of the FSIA. *See Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003); *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005); *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran*, 126 S.Ct. 1193 (2006).

The Fifth Circuit's Opinion rewards a foreign sovereign for breaching a contract that contains an express waiver of immunity by granting immunity and is in direct contradiction with this Court's well-reasoned holdings in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), regarding the commercial character of Can-Am's actions. The Fifth Circuit's erroneous holdings must be corrected so that this important law can be correctly applied throughout the many district courts.

1. The T&T Government Expressly Waived Immunity.

After an exhaustive review of case law, no other Circuit Court or any U.S. Supreme Court cases hold that an express waiver of immunity clause has been obliterated because the contract was deemed conditional. The Fifth Circuit's conclusion that the express waiver provision in this case was somehow conditional is contrary to the clear and unambiguous language of the waiver provision itself. (App. F3). Under the Fifth Circuit's interpretation of an express waiver provision, any time a sovereign wrongfully breaches a contract with a United States citizen that contains a provision expressly waiving sovereign immunity, that sovereign will nevertheless be granted immunity because the contract containing the waiver was breached and not completed.

Section 1605(a)(1) of the FSIA states the following:

> a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver

> which the foreign state may purport to effect except in accordance with the terms of the waiver;

28 U.S.C. §1605(a)(1).

In this case, the Government explicitly waived immunity as required by the FSIA by entering into an irrevocable pay order containing an express waiver of immunity (the Bower Cotton transaction). (App. F3). Contrary to the Fifth Circuit's Opinion, the plain language of the written transaction documents demonstrates that the express waiver of immunity in this case was "effective" and not "conditional." The THA, acting for and on behalf of T&T, agreed that it was "waiving all rights of immunity regardless of whether diplomatic, sovereign, or otherwise . . . " (App. F3) Nothing in this language or the rest of the transaction documents in question suggests the express waiver was conditional. *Id.* The Fifth Circuit's Opinion is clearly erroneous and allows a sovereign to benefit from its breach by granting immunity in spite of an express waiver of immunity. To allow the Fifth Circuit's decision to stand would in effect reward T&T for breaching the contract they voluntarily entered into and setting a dangerous precedent for other nations to follow.

As the documents clearly demonstrate, the Chief Secretary actually approved the contract in the Bower Cotton proposal under penalty of perjury. (App. F1). Can-Am was to receive a 10% commission for securing funding. Ms. Sorsby secured funding for the T&T Government through the Bower Cotton transaction and Mohammed pledged to that transaction that funding was accepted on behalf of the T&T Government, by Hochoy Charles, the highest government official for Finance for the T&T Government, when he issued a Letter of Exclusivity giving

Peter Newton/Bower Cotton the exclusive right to enter the contract. The matching transaction codes on all documents related the funding of this transaction including, but not limited to, the Letter of Exclusivity and Irrevocable Pay Order evidenced the approval of the transaction. Mr. Newton preceded with the contract to enter the funds and probed the bank account at the instruction of the Chief Secretary and Secretary of Finance, Hochoy Charles, but the T&T Government did not have the funds that they pledged under penalty of perjury that they had, therefore causing a breach in the contract. (App. F).

Ultimately, the T&T Government reneged on the funding secured for them leaving Can-Am uncompensated for years of efforts on the T&T Government's behalf. Ms. Sorsby did everything she was requested to do. Her performance was complete without complaint or criticism. (App. F).

The failure to fund was not a "decision" made by the Chief Secretary and there is no language suggesting that the waiver was conditional on the government not breaching the agreement. (App. F). The Fifth Circuit's reasoning ignores the Government's clear and express waiver and allows any foreign state in breach of an agreement with an explicit waiver of immunity clause to use its own wrongful breach as a defense to waiver. That is clearly not the purpose of immunity under the FSIA. The T&T Government should not receive their reward of jurisdictional immunity because they chose to breach a written agreement. The Fifth Circuit's Opinion must be corrected to prevent other nations from entering into contracts containing express waivers of immunity, later breaching those agreements and using that very breach to escape prosecution in the United States.

2. All Three Prongs of The Commercial Activity Exception Apply.

Even disregarding the T&T Government's express waiver of immunity under the FSIA, the undisputed facts demonstrate that the commercial activity exception applies in this case.

Section 1605(a)(2) of the FSIA states the following:

> a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

28 U.S.C. §1605(a)(2).

a. The causes of action in this case are based upon a commercial activity carried on in the United States by an agent of the foreign state, Ms. Sorsby; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere.

Contrary to the Fifth Circuit's ruling, Ms. Sorsby, as CEO of Can-Am, conducting financial consulting services at the written request of the T&T Government, and as their agent and financial consultant, in the United States means the T&T Government carried on commercial

activity having a substantial contact with and in the United States. Ms. Sorsby acted as an agent of the foreign state while conducting commercial activity inside the United States. Specifically, Ms. Sorsby solicited various funding proposals for the T&T Government from her offices in Texas.

The Fifth Circuit's opinion relies on factors defined in *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines* to determine whether an agency relationship existed between Can-Am and the T&T Government, but ignores the distinguishing and dispositive fact that in this case there was a formal agency agreement between the parties. The *Walter Fuller* case did not involve an express agency agreement between the Philippine government and the PGCC. 965 F.2d 1375 (5th Cir. 1992). Here, there is a written agency agreement between the parties. Hochoy Charles, with the proper authority as Chief Secretary, formally appointed Ms. Sorsby, CEO of Can-Am, as the Government agent and the financial consultant. As "financial consultant," Ms. Sorsby was granted "the authority and responsibility to oversee the financing process, on behalf of the Assembly." *Id.* The Fifth Circuit's conclusion that Can-Am did not substantiate that it acted as the agent of the Government simply ignores the undisputed record in this case.

Moreover, the Fifth Circuit's Opinion erroneously concludes that it is illogical that Ms. Sorsby's conduct in the United States qualifies as the commercial activity of the T&T Government on whose behalf and at whose request Ms. Sorsby acted in the United States. The Fifth Circuit concludes "there are no cases to support the notion that investigating potential investments options constitutes commercial activity under the FSIA." The FSIA

defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. §1603(d) (1988). The commercial character of an act must be determined by reference to the nature of the act and not its purpose. *Id.* Taken together, these two provisions mean that "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are commercial within the meaning of the FSIA." *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992) (holding sovereign's issuance of debt constituted commercial activity). To determine whether the foreign state acted in the manner of a private player in the market, the court must look to the type of actions in which the foreign state engaged. *Id.* If the actions are the type that private persons are able to legally engage, then the actions are commercial under the FSIA. *See Rush-Presbyterian-St. Lukes Medical Cent. v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir.), cert. denied, 493 U.S. 937, 110 S.Ct. 333, 107 L.Ed.2d 322 (1989).

In *Weltover*, this Court held that a sovereign's issuance of debt instruments was commercial activity under the FSIA. The Court reasoned as follows:

> The commercial character of the Bonds is confirmed by the fact that they are in almost all respects garden-variety. debt instruments: They may be held by private parties; they are negotiable and may be traded on the international market (except in Argentina); and they promise a future stream of cash income.

504 U.S. 607, 616, 112 S.Ct. 2160, 2167.

It is illogical that a sovereign's investigation of potential investment options would be any less commercial in nature than a sovereign's issuance of bonds as part of a plan to stabilize its currency, as was the case in *Weltover*.

The T&T Government was acting as a "private player" in directing its agent and financial consultant to seek in the U.S. investment opportunities from United States companies. It is undisputed that Ms. Sorsby engaged in many activities in the United States at the behest of the T&T Government that qualify as commercial activity. (App. D). For example, in 1999, Ms. Sorsby went to the United States at the request of the Government and negotiated with numerous people on the Government's behalf. The negotiations resulted in: (1) Ms. Sorsby submitted a funding program proposal from Gee & Jenson, an American company, headquartered in West Palm Beach, Florida; (2) Ms. Sorsby and Rennie Dumas, the THA's Business Analyst, continued their work in the United States and Tobago on funding program proposals; (3) Allan Richard's wrote to Ms. Sorsby in the U.S. to set up meetings in Tobago for her to travel to Tobago with Hugh Hague from Canada, to complete the Bower Cotton proposal and travel on to London for a meeting with Bower Cotton all of which including, but not limited to, the irrevocable pay order and letter of exclusivity was negotiated and originated in the U.S. in the office of Can-Am attorney through telephone conferences, fax, and e-mail prior to traveling to Tobago and on London; (4) Ms. Sorsby was also pursuing potential funding programs in the United States through proposals made by Raymond James and Frankwell Investments, two additional American companies; and (5) the T&T Port Authority also contacted Ms. Sorsby regarding funding programs to finance port

upgrades, and the Minister of Energy and Energy Industries regarding the Raymond James proposal. (App. D).

In 2002, at the request of the government: (1) Ms. Sorsby and government representatives continued working together in the United States and Tobago on funding programs by Raymond James and Frankwell Investments; (2) Ms. Sorsby continued her efforts in the United States to secure funding proposals for the ferry project; (3) Allan Richards issued a formal invitation to the United States for scheduled meetings in Tobago for Raymond James and Frankwell Investments; and (4) the Chairman of Petrotrin, the government owned oil company, wrote to Ms. Sorsby in the United States requesting a funding program proposal by Raymond James. (App. D).

In this case, there can be no question that Can-Am's conducting financial consulting services in the United States as the actual and apparent agent for a foreign government should qualify as a commercial act performed by a foreign state in the United States. The Fifth Circuit's holding is simply contrary to well-settled principles of agency law. *See Holloway v. Skinner*, 898 S.W.2d 793, 795 (Tex.1995) (holding the acts of an agent on behalf of its principal are deemed to be the principal's acts). On this record, both the first and second prongs of the commercial activity exception under the FSIA are satisfied.

b. The causes of action in this case are based upon an act outside the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

In so far as the third prong of the commercial activity exception, without question the T&T Government's breach

caused a direct effect on the United States. Ms. Sorsby is an American citizen and CEO of an American company who was to be compensated for her work in the United States. The Fifth Circuit's narrow focus on the Bower Cotton transaction fails to recognize that the Bower Cotton transaction as well as many other funding proposals were negotiated and originated in the United States. At the urging of the Government, Ms. Sorsby, as CEO of Can-Am, and the duly appointed agent and financial consultant for the T&T Government, dedicated three years performing the work requested of her by T&T Government officials.

The T&T Government's wrongful conduct directly affected a United States citizen and a United States company engaged by the Government to solicit sources in the United States for commercial financing originating in the United States, and to create profits to fund critical infrastructure projects in the foreign country. The third prong of the commercial activity exception is, therefore, also satisfied.

CONCLUSION

The T&T Government's wrongful conduct should not be rewarded by ignoring the explicit waiver or disregarding the true nature of the Government's commercial activities in the United States. Doing so would render bargained-for explicit waivers of immunity worthless in the wake of a foreign governments breach and set a dangerous precedent for future cases.

For the forgoing reasons, Petitioners respectfully request that certiorari be granted.

Respectfully submitted,

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APPENDIX A

169 Fed. Appx. 396

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20007

CAN-AM INTERNATIONAL, LLC,

Plaintiff-Appellant,

v.

THE REPUBLIC OF TRINIDAD AND TOBAGO;
THE TOBAGO HOUSE OF ASSEMBLY,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas, Houston Division

(Filed March 1, 2006)

Before GARWOOD, CLEMENT, AND PRADO, Circuit Judges.

EDWARD C. PRADO, Circuit Judge:*

Can-Am International, L.L.C. ("Can-Am") appeals the district court's entry of final judgment dismissing its action for lack of subject matter jurisdiction. The district court found that no exception to sovereign immunity

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

applies under the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, to support jurisdiction over Appellees.

I

Appellant Can-Am International, L.L.C. is registered in Texas. Laura Lee Sorsby is its founder and CEO. Appellees are the Republic of Trinidad and Tobago and one of its political bodies, the Tobago House Assembly.

The Republic of Trinidad and Tobago ("T&T") comprises two islands in the Caribbean Sea near Venezuela. After achieving independence from Great Britain in 1962, the T&T central government established the Tobago House of Assembly ("THA") to administer Tobago Island. The THA consists of an Executive Council, which comprises several Secretaries, including the Chief Secretary. The responsibilities of the Office of Chief Secretary include planning Tobago Island development projects. At all relevant times in this case, the House Chief Administrator or Chief Secretary was either Allan Richards or Hochoy Charles.[1]

In 1997, Sorsby marketed her services as a financial consultant to T&T and the THA. After learning that the THA needed financing for various development projects, Sorsby incorporated Can-Am International, L.L.C. ("Can-Am") in Texas in 1998 and began submitting finance proposals to the THA.

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[1] The titles of these individuals and the dates in which they held these titles are not clear from the parties' briefs, but (like the district court noted in its order) these details do not affect the court's disposition.

Can-Am asserts that it sought funding proposals for conventional financing to be backed by a government guarantee in early 1998. Later, in November 1998, it sought funding proposals for conventional financing to be collateralized by THA assets. On February 5, 1999, Sorsby sent a letter to Richards outlining a financing program Sorsby had arranged through a large United States insurance company. In that letter she wrote:

> We are willing to come back to Tobago and work with you in order to try and put this whole thing together. But before we come, we would appreciate it if you could appoint our company as your consultant/agent. This does not commit the Government to anything. You do not have to pay us anything if the loan does not go though [sic]. If you decide you do not wish to take the loan and participate in the trading program, then the appointment becomes null and void.

On February 22, 1999, the THA appointed Sorsby, CEO of Can-Am International, L.L.C., as the financial consultant for three of its development projects. Paragraphs 5 and 6 of the appointment letter read:

> 5. This agency will be revoked in writing if Ms. Sorsby has failed to perform.
>
> 6. This agency agreement will remain in effect for six months, with an option of renewal, subject to the Tobago House of Assembly's satisfaction with Ms. Laura-Lee [sic] Sorsby's performance and the continuance of its engagement with ongoing financing arranged by Can-Am International L.L.C.

Charles allocated THA office space to Sorsby along with this appointment.

On March 27, 1999, the parties formalized their relationship by outlining their respective responsibilities in a Memorandum of Understanding ("MOU").[2] Sorsby's responsibilities included: introducing different financing structures to the THA for government review and selection; arranging the funding institution subject to THA approval; providing contractual arrangements with program managers of trading groups acceptable to the THA; negotiating interest rates, if required, payable on the funds held in T&T's account, subject to the approval of the THA; arranging for the profits generated by the financing program to go into a THA trust account; working with the THA to arrange collateral, if required, for the financing program selected by the THA; and investigating and arranging the lowest interest rates, if required, for the THA's selection and approval.

The THA's responsibilities under the MOU included: providing the most feasible and high priority projects for financing; getting all the necessary government approvals to implement the financing program selected by the THA from those submitted by Sorsby; executing all documents necessary to implement the selected financing program; and arranging all necessary government collateral as required.

The MOU states in paragraph 1.1, "All matters that require financial commitments by the THA shall be brought to the notice of the THA for agreement before any final commitments are made."

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[2] As noted by the district court, the MOU states that it is between the THA and Sorsby, rather than the THA and the plaintiff Can-Am. The district court did not decide "whether the party designation was part of an on-going misrepresentation or merely a drafting error."

The MOU's fee clauses provide that:

> THA agrees to pay the Financial Consultant a fee equal to ten percent (10%) of all monies earned from the private placement (or other funding programs) out of funds provided to THA generated by the funding program arranged by the Financial Consultant. . . .
>
> In the event that THA selects a form of conventional financing from the financing structures submitted by the Financial Consultant, the parties shall negotiate . . . a fee agreeable to both parties to compensate the Financial Consultant for the services in arranging such financing.

As to duration, the MOU states:

> 1.4 The agency appointment will remain in effect from the time trading begins or as long as THA is receiving funds through any trading programs of financial arrangements provided by the Financial Consultant. . . .
>
> 1.5 This agency appointment can only be revoked in writing if the Financial Consultant fails to perform on the terms of this MOU.

Furthermore, the MOU has a choice of law provision: "This MOU and all amendments thereto shall be governed and constructed in accordance with the laws of the Republic of Trinidad and Tobago."

The THA did not pursue the financing program outlined in Sorsby's February 5th letter. In early April 1999 Sorsby arranged for the THA officials to travel to London, England, for a series of meetings where various

individuals presented investment opportunities for the THA's consideration.[3] One proposal came from a London firm called the Bower Cotton Group, for which payment was guaranteed by a bank in Switzerland. The proposal required Appellees to invest ten million United States dollars. Three days afterwards,[4] Sorsby wrote the THA's Chief secretary:

> We have wonderful and timely news for the THA. Bower Cotton . . . [has] available at the present time US$100 million dollars of good clean funds. They have an investor they are placing into the program. Because of the investor's contract with Bower Cotton . . . we are on a short time fuse [sic].

After requesting a letter of intent, proof of funds, and pay orders, Sorsby wrote, "We must have these things in order to get your contract issued from the bank for your review and approval." Regarding the pay orders, she wrote, "Remember our pay orders are generated through the trade, so if you do not go forward with the contract, these pay orders will be worthless."

Thus, upon returning to Tobago, the House Chief Secretary executed various documents related to the Bower Cotton proposal including a letter of intent, an "Irrevocable Pay Order" ("pay order"), and a letter of exclusivity. These documents explicitly reference a code specifically designated for the Bower Cotton proposal and are signed by the THA Chief Secretary Charles. The

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[3] Although Appellees originally sought conventional financing proposals, it considered financing through investment.

[4] The letter erroneously bears the date March 12, 1999. It should have been dated April 12, 1999.

documents are dated April 19, 1999, but were signed on April 30, 1999.

The letter of intent is addressed to Peter Newton,[5] the program manager for the potential investment, and states, "I herewith grant you the exclusive right to provide me with the best available investment program to facilitate the private placement of these funds." The letter provides that the THA Chief Secretary is "willing and able to enter $ Ten Million U.S. [sic] dollars for participation into a private bank-secured investment programme, subject to my [the Chief Secretary's] approval of the contract."

The pay order provides that Sorsby, in her individual capacity, will receive "[a] total of 10% (Ten Percent) of the net disbursable profits received by [the THA] or any Company on their behalf to facilitate the investment transaction. . . . " The pay order names Sorsby as the beneficiary. It also states, "The Irrevocable Pay Order is valid upon commencement of the start of the transaction herein. . . . " The pay order also includes a waiver of immunity rights, and it submits the transaction to governance under the International Chamber of Commerce Rules of Conciliation and Arbitration.

The letter of exclusivity is also addressed to Newton and states in relevant part: "I [Charles], the undersigned, herewith grant the trade program manager/administrator/facilitator full exclusive right as our sole agent for 20 banking days from the above date [April 19, 1999], to

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[5] Appellees identify Newton as an affiliate of Nikea, N.V. ("Nikea"), an engineering company that Sorsby alleges would have helped to construct the THA's projects.

enter these funds for me, or the corporation into the best available bank-secured investment program."

Despite Sorsby's recommendation to accept the Bower Cotton proposal and a letter from her stating that there was a short window of time to decide, the THA did not fund the Bower Cotton proposal. On July 11, 1999, Sorsby wrote an email to Rennie Dumas, a staff member at the THA, and stated, " . . . I cannot afford to keep giving away my services. . . . [T]he letter [Charles] prepared and the payorder [sic] meant nothing since [the THA] did not go forward." Sorsby continued to submit investment proposals to the THA, which rejected them all. On March 7, 2000, Sorsby wrote a letter addressed to Charles expressing her frustration with the THA: "I have always tried to get you what you need, lawyers, funding etc. [sic], and have not ever charged you a dime." Thereafter, some THA officials met with some financiers introduced by Sorsby, but did not enter into any agreement with them. The THA never obtained or received any money from any financing source introduced by Sorsby or Can-Am.

II

In November 2001, Can-Am filed a complaint against T&T and the THA in the District Court for the Southern District of Texas. It later filed an amended complaint to include a claim for quantum meruit. T&T and the THA filed a motion to dismiss, or alternatively, a motion for summary judgment based primarily on the Foreign Sovereign Immunity Act (FSIA). The district court denied the motion because it needed discovery to decide the issue of whether the FSIA applied to Appellees.

After discovery, in April 2004, T&T and the THA filed a motion for summary judgment claiming the court did not have jurisdiction over Can-Am's claims pursuant to the FSIA. Alternatively, they argued for summary judgment because no genuine issue existed as to any material fact and that both T&T and the THA were entitled to judgment as a matter of law for all claims.

On September 8, 2005, the district court judge dismissed Can-Am's claim for lack of subject matter jurisdiction. It concluded that the FSIA precluded the court from reaching the merits of the case, reasoning that "there is no basis to overcome [Appellees'] presumption of immunity." The district court denied Can-Am's motion for reconsideration on November 23, 2004.

III

Can-Am appeals the district court's entry of final judgment dismissing its action for lack of subject matter jurisdiction after having found no exception to sovereign immunity applies to Appellees. Can-Am argues that Appellees are subject to jurisdiction under two exceptions to its sovereign immunity under the FSIA, the waiver exception and the commercial activity exception.

The existence of subject matter jurisdiction under the FSIA is a question of law which is reviewed *de novo*. *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana S.C.*, 923 F.2d 380, 386 (5th Cir. 1991). The FSIA provides a framework for determining whether a court within the United States may exercise jurisdiction over a foreign state. The FSIA provides the sole basis for obtaining jurisdiction over a

foreign state in a court in the United States. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Under the FSIA, a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless one of the several statutorily defined exceptions applies. 28 U.S.C. § 1604; *see Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-89 (1983) ("When one of [the] specified exceptions applies, 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.'") (citing 28 U.S.C. § 1606). The exceptions are enumerated in 28 U.S.C. § 1605.

Courts must apply the FSIA "in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden*, 461 U.S. at 493. The party claiming FSIA immunity must establish a prima facie case that it satisfies FSIA's definition of a foreign state, thereby creating a presumption of immunity. *United States v. Moats*, 961 F.2d 1198, 1205 (5th Cir. 1992); *see also Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1470 (9th Cir. 1995). Then, the burden of production shifts to the non-movant to provide facts showing that an exception applies. *Moats*, 961 F.2d at 1205. To overcome a presumption of immunity, Can-Am must prove that the conduct that forms the basis of its complaint falls within one of the statutorily defined exceptions. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610-11 (1992); *see* 28 U.S.C. 1605 (exceptions to the jurisdictional immunity of a foreign state). Because it is undisputed that T&T is a foreign state and that the THA is T&T's instrumentality as defined in 28 U.S.C.

§ 1603, under the FSIA, they enjoy a presumption of immunity. Accordingly, the issue of subject matter jurisdiction turns on whether Can-Am rebuts the presumption of immunity enjoyed by T&T and the THA.

Two FSIA immunity exception provisions are at issue. The first is section 1605(a)(1), which discusses waiver. The second is section 1605(a)(2), which discusses commercial activity. It is Can-Am's burden to show that Appellees waived their immunity, or that Appellees' conduct that forms the basis of Can-Am's complaint is commercial activity as defined by the FSIA. A failure to satisfy the statute's exceptions deprives a federal court of subject matter jurisdiction. *Stena,* 923 F.2d at 386.

A. Whether T&T or the THA waived their immunity

Neither T&T nor the THA waived sovereign immunity with respect to the conduct upon which Can-Am's complaint stands, because the document containing the waiver clause was conditional, and the condition never occurred.

Subsection (a)(1) states:

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver[.]

28 U.S.C. § 1605(a)(1).

To be effective, a waiver of sovereign immunity must be either implicit or explicit. FSIA's "waiver exception is

narrowly construed." *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 482 (5th Cir. 1998).[6]

The district court held that the waiver of immunity rights in the Bower Cotton pay order was "ineffective" and "condition[al]." The district court stated:

> [T]he pay order was never executed because no [THA] funds ever transferred to the disbursement account. In fact, the transaction ended with the [THA]'s decision to withhold its funds. Without the transfer of funds, there is no transaction and therefore, no pay order. Hence, there is no waiver.

Can-Am disagrees with the district court's reasoning. It claims the waiver of immunity rights in the Bower Cotton pay order is a general express waiver. The gravamen of Can-Am's argument is that the pay order is by its own terms "valid upon the commencement of the start of the transaction herein," such that the transaction began with Charles's submission of the pay order, the letter of intent, and the letter of exclusivity. Can-Am therefore claims that the THA's "decision" to withhold funds was a breach of its "obligation" to fund.

In addition, Can-Am argues that the district court's assertion that "[n]o evidence has been proffered that the Chief Secretary ever approved the contract to fund the Bower Cotton proposal" is false. It refers to the letter of intent, saying that Charles "expressly approved the transaction" by signing it. Can-Am then makes the leap that Charles approved the "contract" through the letter of exclusivity by "granting the trade program manager/

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[6] Here, only an explicit waiver is at issue.

administrator/facilitator full exclusive right as our sole agent for 20 banking days . . . to enter the funds . . . in the best available bank-secured investment program." Thus, Can-Am maintains that a contract was formed through the THA's submission of these documents.

Finally, Can-Am takes issue with the notion that the waiver is conditional on the funding of the Bower Cotton proposal. Can-Am states, "[t]here is no language in the waiver provision or any other evidence before the district court that limits or conditions in anyway the explicit waiver." Can-Am focuses on the word "all" in the waiver clause found in the pay order:

> This document binds all parties, their employees, associates, transfers, assigns and/or designees. Any facsimile of this document shall be deemed as legal and binding on all parties hereto and shall be so construed to any court of law regardless of State, nation, or Province waiving *all* rights of immunity, regardless of whether diplomatic, sovereign or otherwise, which shall give this document full force and legal effect to true purpose and intent of this agreement as so construed by its signing parties.

(Emphasis added.) Thus, Can-Am argues that the waiver clause in the pay order is explicit and unconditional.

Appellees maintain that Can-Am's argument "is based on a strained interpretation of language in a document ostensibly prepared for a transaction that never occurred. . . . " They emphasize that without a transfer of funds in connection with the Bower Cotton proposal, there was no transaction. Without a transaction, there is no applicable waiver.

We agree with the district court that "the alleged waiver was a limited waiver." The waiver is contained in a document that references a specific investment transaction for which there is no contract. The waiver is limited in its scope, applying solely to the Bower Cotton proposal. The pay order specifically references the code designating the Bower Cotton proposal. The word "all" in the waiver clause is also conditioned on the funding of the Bower Cotton proposal. The payment authorized by the order is conditioned on the investment transaction, which in turn relied on the THA's approval of and signature on a contract between it and the bank. There was no investment transaction in relation to the Bower Cotton proposal. Sorsby's contingency fee depended on profits generated by an investment that was never made; the THA never signed a contract with a bank in relation to such an investment. The waiver clause exists within a document that specifically relates to an investment transaction which never transpired. Thus, the waiver of "all rights of immunity" also relates to the investment transaction which never transpired. We find that Appellees did not waive their sovereign immunity.

B. Whether T&T's/the THA's conduct fits the commercial activity exception

Foreign sovereigns are not immune from judicial process in actions based upon commercial activity that has a jurisdictional nexus with the United States, as defined by the FSIA. *Stena*, 923 F.2d at 386 (citing 28 U.S.C. § 1605(a)(2)). Because Can-Am's action is not based upon a commercial activity that has a jurisdictional nexus with the United States, Appellees remain immune.

In order to decide whether the commercial activity exception applies, first, the relevant activity must be identified. "This requires focusing on the acts of the named defendant, not on other acts that may have had a causal connection with the suit. In particular, we must isolate those specific acts of the named defendant that form the basis of the plaintiff's suit." *de Sanchez v. Banco Central de Nicaragua,* 770 F.2d 1385, 1391 (5th Cir. 1985) (citation omitted).

Second, the court must determine if the relevant activity is sovereign or commercial. The statutory definition of "commercial activity" is "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d).[7] The second sentence of § 1603(d) directs the courts to look at the "nature" of an activity rather than its "purpose" in determining whether it is commercial. Thus, the Supreme Court has defined an activity as having a commercial nature for purposes of FSIA immunity if it is of a type that a private person would customarily engage in for profit. *Weltover,* 504 U.S. at 614; *Callejo v. Bancomer, S.A.,* 764 F.2d 1101, 1108 n.6 (5th Cir. 1985). A foreign government's acts may be deemed commercial when that foreign government is not

[7] Courts have accepted that the circular definition for "commercial activity" in § 1603(d) was a mandate by Congress authorizing the courts to define the concept on an case-by-case basis. *See* H.Rep. No. 9401487, 94th Cong., 2d Sess. at 16 (stating that federal courts are given "a great deal of latitude in determining what is a 'commercial activity' " under the FSIA). The statute does give us some guidance, however, in approaching the task of distinguishing between sovereign and commercial activities, as discussed below.

acting "as a regulator of the market, but in the manner of a private player within it."[8] *Weltover,* 504 U.S. at 614.

Finally, if the relevant activity is commercial in nature, the court must determine whether it had the requisite jurisdictional nexus with the United States. A foreign state will not be immune in a case

> [a] in which the action is based upon a commercial activity carried on in the United States by the foreign state; or [b] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [c] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]

28 U.S.C. § 1605(a)(2). Any one of these connections with the United States, if met, provides a sufficient basis for jurisdiction. *Stena,* 923 F.2d at 386.

Stena further states, "[n]ot only must there be a jurisdictional nexus between the United States and the commercial acts of the foreign sovereign, there must be a connection between the plaintiff's cause of action and the commercial acts of the foreign sovereign." *Id. See also*

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[8] Courts have typically held that contracts for the procurement of goods and services are commercial rather than governmental in nature. *See United States v. Moats,* 961 F.2d 1198, 1205 (5th Cir. 1992) (contract for settlement agreement is commercial); *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic,* 877 F.2d 574, 581 (7th Cir. 1989) (contract for purchase of medical services is commercial); *Practical Concepts, Inc. v. Republic of Bolivia,* 811 F.2d 1543, 1550 (D.C. Cir. 1987) (contract for developing rural areas is commercial); *Tex. Trading & Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300, 310 (2d Cir. 1981) (contract for purchase of cement is commercial).

NYSA-ILA Pension Trust Fund v. Garuda Indonesia, 7 F.3d 35, 38 (2d Cir. 1993) ("In construing the commercial activity exception, courts have required that a significant nexus exist between the commercial activity in this country upon which the exception is based and a plaintiff's cause of action.") (citations omitted); *Moats,* 961 F.2d at 1205-06; *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation,* 730 F.2d 195, 200 (5th Cir. 1984). The phrase "'[based upon'] is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Saudi Arabia v. Nelson,* 507 U.S. 349, 357 (1993). The court must therefore focus only on the conduct on which Can-Am's action is based. *Id.* at 356.

Can-Am's action is based on the appointment of Sorsby as financial consultant for Appellees and the MOU defining Sorsby's and the THA's responsibilities. It argues that the MOU is an enforceable contract for Can-Am's services. Thus, Can-Am argues that T&T and the THA are subject to jurisdiction under each of the three parts to the commercial activity exception.

1. Commercial activity in the United States

Section 1603(e) of the FSIA states: "A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States."

The district court held that Can-Am failed to present any evidence indicating that T&T or the THA carried on any activity that had substantial contact with the United States. It went on to state that none of the THA's relevant activities, including its appointment of Sorsby as its

financial consultant and its consideration of various financing and investment proposals, occurred in the United States. However, Can-Am disputes this conclusion, pointing to Sorsby's acts "as CEO of Can-Am, conducting financial consulting services for and on behalf of [Appellees], as their agent and financial consultant, in the United States." Can-Am invokes agency theory to meet the requirement that the requisite acts be those of the named defendant.

Appellees respond that Can-Am has not alleged anywhere that Appellees engaged in any commercial activity in the United States. Rather, they point out that all meetings between Can-Am and T&T or the THA occurred in either Trinidad & Tobago or London, and that all documents were signed in Tobago. Appellees also state that the THA "declined to participate in [an] alleged investment opportunity that would have required representatives to travel to New York and deposit funds in an unnamed bank there. . . . " Appellees do not respond to Can-Am's allegation that Sorsby was T&T's and/or the THA's agent, likely because Can-Am did not substantiate its theory.

In order for Can-Am's claim under this prong to survive, the commercial acts must be of the named Defendant. *De Sanchez,* 770 F.2d at 1391 (citation omitted). Can-Am argues that, as financial consultant, it acted as Appellees' agent and that its actions can be imputed to T&T and the THA.

Can-Am cites to *Weltover* to support its contention. But, as Appellees identified in their brief, *Weltover* does not conclude that the acts of the plaintiff within the United States may be attributed to the defendant to defeat

sovereign immunity. Rather, it is the acts of the foreign government that determine if the foreign sovereign's acts are "commercial" within the meaning of the FSIA. *Weltover,* 504 U.S. at 614-16.

The burden of proving an agency relationship, which would enable Can-Am to hold T&T and the THA liable, falls upon Can-Am. *See Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines,* 965 F.2d 1375, 1381 (5th Cir. 1992). "Our precedent . . . indicates . . . we look to the ownership and management structure of the instrumentality, paying particularly close attention to whether the government is involved in day-to-day operations, as well as the extent to which the agent holds itself out to be acting on behalf of the government." *Id.* at 1382 (citing *Hester Int'l Corp. v. Fed. Rep. of Nigeria,* 879 F.2d 170, 178, 181 (5th Cir. 1989)). The record does not support the allegation that Appellees, as the supposed principal to Sorsby's agent, had both the right to assign Sorsby's task and control the means and details of the process by which she would accomplish it. Can-Am did not meet its burden of proof in proving the existence of a principal-agent relationship between it and Appellees.[9]

Since Can-Am does not identify acts carried on in the United States having substantial contact with the United States by the named Appellees, we lack jurisdiction over

[9] Can-Am also points to Texas law, citing *Holloway v. Skinner,* 898 S.W.2d 793 (Tex. 1995), for the proposition that the acts of an agent on behalf of the principal are deemed to be the principal's acts. Even if we chose to rely on Texas law, Can-Am's argument would fail since it does not cite any facts to show it was controlled by T&T and the THA. *See Walker Ins. Servs. v. Bottle Rock Power Corp.,* 108 S.W.3d 538, 549 (App. Ct. Tex. 2003) (stating that the defining feature of the agency relationship is the principal's right to control the actions of the agent).

Appellees under this prong of the commercial activity exception.

2. Acts performed in the United States in connection with commercial activity elsewhere

Acts of a foreign sovereign in the United States in connection with foreign commercial activity may give rise to subject matter jurisdiction. *Stena,* 923 F.2d at 388. In *Stena,* the court held that the connection between the commercial activity and the plaintiff's complaint had to be material. *Id.* "Any material connection between 'commercial activity elsewhere' and the plaintiff's complaints . . . is irrelevant to the determination of subject matter jurisdiction." *Id.* at 388. The material connection must be between the act performed in the United States and the plaintiff's cause of action. *Pere,* 150 F.3d at 482.

The district court disposed of Can-Am's argument with regard to this prong in one sentence, which stated that "this prong does not apply because the facts do not identify a commercial act performed in the United States."

Can-Am argues we have jurisdiction because Sorsby traveled throughout the United States to meet and negotiate with potential investors, and that Sorsby was Appellees' agent, whose acts are imputed to Appellees. Appellees respond that since the proposed transaction with a third party never occurred, Can-Am cannot satisfy this prong of

the commercial activity exception requiring that an act be performed in the United States.[10]

Can-Am asserts that its financial consulting services are the "commercial act[s] performed in the United States." In the instant case, the material connection must exist between Can-Am's financial consulting services and Appellees' alleged breach of contract, fraud, or negligent misrepresentation. First, there is a question as to whether Sorsby's acts in the United States qualify as "commercial activities." There are no cases to support the notion that investigating potential investment options constitute commercial activity under the FSIA. Second, Can-Am's allegation that it acted as an agent of Appellees is not substantiated. Third, it is illogical that plaintiff's own acts create the required material connection underlying its cause of action, because, after all, Can-Am maintains that it met its end of the bargain. Can-Am does not assert that Appellees performed any other commercial activities within the United States that give rise to its cause of action.

Another possible basis for Can-Am's claim is its contingent fee based on the breach of an alleged contract entered into in Tobago. However, Can-Am's services were to be rendered in Tobago, and payment of Can-Am's contingent fee was to be paid, not from the United States, but from profits (if any) of the alleged investment program held in a Swiss bank. Therefore, we have no jurisdiction under this prong of the commercial activity exception.

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[10] Appellee's brief also correctly notes, "In fact, Can-Am fails to allege in its Amended Complaint that either T&T [or the] THA has conducted any commercial activity anywhere."

3. Commercial activity outside the United States that has a direct effect in the United States

Finally, Can-Am argues that "the [Appellees'] breach caused a direct effect on the United States" because Sorsby, an American citizen and CEO of an American company, expected to be compensated for her work in the United States. The only direct effect claimed by Can-Am is the financial loss to Sorsby from Appellees' alleged breach.

The Supreme Court addressed the "direct effect" exception in *Weltover,* 504 U.S. 607 (1992). In *Weltover,* the plaintiffs held certain Argentine bonds. These bonds required Argentina to make payment of principal and interest to bondholders in U.S. dollars. Payment could be made through transfer on the London, Frankfurt, Zurich, or New York market, at the election of the creditor. When the bonds began to mature, Argentina unilaterally extended the time for payment and offered bondholders substitute instruments. The plaintiffs, two Panamanian corporations and a Swiss bank, refused to accept the rescheduling and insisted on full payment, specifying New York as the place where payment should be made. The plaintiffs then brought suit in the U.S. District Court alleging that Argentina's failure to pay the bonds according to the original terms was a breach of contract. Jurisdiction was alleged under section 1605(a)(2) of the FSIA. The plaintiffs argued that Argentina's refusal to make payment caused a "direct effect" in the U.S. because payment that was supposed to have been made in New York was not made. The Supreme Court agreed. The Supreme Court stated that "an effect is 'direct' if it follows 'as an immediate consequence of defendant's . . . activity.'" *Weltover,* 504 U.S. at 618 (citation omitted). After noting that the plaintiffs had designated their accounts in New

York as the place of payment, the Court concluded, "Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 619.[11]

We agree with the district court that Can-Am's losses in pursuit of an acceptable investment opportunity for the Appellees are not enough to meet this prong of the commercial activity exception. Even if Can-Am did provide evidence of its financial losses, this prong still would not be met. It is undisputed that neither T & T nor the THA ever transferred money in connection with any alleged investment opportunity identified by Can-Am; hence, the type of activity found to be commercial in *Weltover* and other cases is absent here. Can-Am's alleged financial loss in the United States in and of itself is not enough to meet this prong of the commercial activity exception.

IV

Neither the waiver exception nor the commercial activity exception to the FSIA apply to Appellees. While the THA did include a waiver clause in the pay order, the pay order was conditioned on a transaction that never

[11] Other examples of direct effect include when a defendant agrees to pay funds to an account in the United States and then fails to do so, *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 896 (5th Cir. 1998), and where a defendant's default on a letter of credit for which plaintiff had designated payment to its bank account in New York, *Hanil Bank v. PT. Bank of Negara Indonesia*, 148 F.3d 127, 132 (2d Cir. 1998).

occurred, and the waiver itself never went into effect. Further, Appellees did not perform any commercial activities in the United States, nor did they perform any commercial activities in the United States with a material connection to the conduct that forms the basis of Can-Am's complaint. Finally, Appellees did not perform any commercial activities outside the United States that had a direct effect in the United States. Because no exception under the FSIA applies, Appellees are entitled to sovereign immunity. We AFFIRM.

APPENDIX B

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CAN-AM INTERNATIONAL, L.L.C., *Plaintiff,*	§	
v.	§	C. A. NO. H-01-3897
THE REPUBLIC OF TRINIDAD AND TOBAGO AND THE TOBAGO HOUSE OF ASSEMBLY, *Defendant.*	§	

FINAL JUDGMENT
(Filed Sep. 08, 2004)

Pursuant to the Memorandum and Order entered in this case, the plaintiff shall take nothing by this suit because the Court lacks subject matter jurisdiction.

This is a FINAL JUDGMENT.

Signed this 8th day of September, 2004.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CAN-AM INTERNATIONAL, L.L.C.,	§	
Plaintiff,	§	
v.	§	C. A. NO. H-01-3897
THE REPUBLIC OF TRINIDAD AND TOBAGO AND THE TOBAGO HOUSE OF ASSEMBLY,	§	
Defendant.	§	

MEMORANDUM AND ORDER
(Filed Sep. 08, 2004)

I. INTRODUCTION

This is a contract action wherein the plaintiff asserts state law causes of action for breach of contract, fraud, negligent misrepresentation, and promissory estoppel against a foreign state. The plaintiff, Can-Am International, L.L.C., is an American company registered in the state of Texas. Laura Lee Sorsby is its founder and CEO. The defendants are the Republic of Trinidad and Tobago and its political subdivision, the Tobago House Assembly. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the defendants have submitted motions for summary judgment. Having considered each party's submissions, the Court is of the opinion that subject matter jurisdiction

does not exist.[1] Accordingly, the Court concludes that this case should be DISMISSED.

II. HISTORY

The Republic of Trinidad and Tobago ("Republic") is comprised of two islands in the Caribbean Sea near Venezuela. After achieving independence from Great Britain in 1962, the Republic central government established the Tobago House of Assembly ("House") to administer Tobago Island. It is undisputed that the Republic is a foreign state and that the House is a Republic instrumentality. Responsibility for the House Office of Chief Secretary includes planning Tobago Island development projects. At all relevant times, the House Chief Administrator or Chief Secretary was either Allan Richards ("Richards") or Hochoy Charles ("Charles").[2]

In 1998, Laura Lee Sorsby ("Sorsby") initiated contact with the House Office of Chief Secretary and offered her services as a financial consultant. She learned that the House needed financing for various development projects.

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[1] While the pleadings and the plaintiff's response to the defendants' motion to dismiss for lack of subject matter jurisdiction initially indicated proper jurisdiction, the Court could not perceive an actual lack of subject matter jurisdiction until the parties conducted further discovery.

[2] The position's actual title or who held it at what particular time does not affect the case's disposition. The Court notes, however, that the dates and titles from the parties' submissions do not coincide. *See*, Defs.' Mem. Mot. Summ. J. Doc. 86, p. 3 (Charles referred to as House Chief Sec'y in Jan. 1998); p. 4 (Richards as Chief Admin. in Nov. 1998); Pl.'s Mem. Mot. Summ. J. Doc. 99, p. 4 (Richards as Chief Admin. in Mar. 1998); p. 5 (Richards as Chief Sec'y in Nov. 1998); and p. 6 (Charles as Chief Sec'y in Feb. 1999).

Shortly thereafter, Sorsby incorporated Can-Am International, L.L.C. ("Can-Am") and began submitting finance proposals to the House. None of the proposals were accepted. In early 1999, however, Chief Secretary Charles allocated House office space to Sorsby and formally appointed her to be the House's financial consultant. On March 27, 1999, the parties executed a Memorandum of Understanding in Tobago.[3] The Memorandum recites that the House is considering three projects for financing and that Sorsby is the House's "Financial Consultant" with authority to oversee the financing process. In relevant part, the Memorandum fee clauses provide that the:

> House agrees to pay the Financial Consultant a fee equal to ten percent (10%) of all monies earned from the private placement (or other funding programs) out of funds provided to the House generated by the funding program arranged by the Financial Consultant. . . .
>
> . . .
>
> In the event that the House selects a form of conventional financing from the financing structures submitted by the Financial Consultant, the parties shall negotiate . . . a fee agreeable to both parties to compensate the Financial Consultant for the services in arranging such financing.

Regarding duration, the Memorandum provides that "[t]his Memorandum shall remain in effect as long as the House is receiving funds through any trading programs or

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[3] The MOU states that it is between the House and Sorsby rather than the plaintiff, Can-Am. The Court has not decided whether the party designation was part of an on-going misrepresentation or merely a drafting error.

financial arrangements provided by the Financial Consultant." Finally, the Memorandum has a choice of law provision that selects Republic law as the basis for governance and construction.

In April 1999, Sorsby arranged for House officials to travel to London, England for a series of meetings where various individuals presented investment opportunities for the House's consideration. One proposal came from a London firm called the Bower Cotton Group. Upon returning to Tobago, the House Chief Secretary received and executed various documents related to the Bower Cotton proposal including a letter of intent and an Irrevocable Pay Order ("pay order").[4] The letter of intent provides that the House Chief Secretary is "willing and able to enter Ten Million US dollars for participation into a private bank-secured investment programme, subject to my [the Chief Secretary's] approval of the contract." The pay order provides that Sorsby, in her individual capacity, will receive "[a] total of 10% (Ten Percent) of the net disbursable profits received by [the House] or any Company on their behalf to facilitate the investment transaction. . . . " The pay order also includes a waiver of immunity rights, and it submits the transaction to governance under the International Chamber of Commerce Rules of Conciliation and Arbitration.

Despite Sorsby's recommendation to accept the Bowers Cotton proposal and a letter from her stating that there was a short window of time to decide, the House

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[4] The plaintiff submitted a "letter of intent" at Doc. 100, tab 7. That letter of intent, however, is not the same as the letter that the plaintiff submitted with Doc. 14 in reference to the Bower Cotton proposal and the defendant's alleged immunity waiver.

declined to fund the Bowers Cotton proposal. Undeterred, Sorsby continued to submit investment proposals, and the House rejected them all. On March 7, 2000, Sorsby revealed her frustration with the House's resistance in a letter to the Chief Secretary. In addition to stating that she was "upset," she remarked "I have always tried to get you what you need, lawyers, funding, etc., and have not ever charged you a dime." In response, the House agreed to consider several more proposals but refused them as well.

In November 2001, Sorsby instituted this action on Can-Am's behalf. Can-Am contends that the Memorandum was a contract and that the House breached it by not funding any of the investment proposals. In addition to denying the existence of any enforceable contract, the Republic and the House contend that their undisputed status as a foreign state precludes subject matter jurisdiction without exception. In response, the plaintiff avers that the letter of intent, executed in concert with the Bowers Cotton proposal, waives immunity and that, in the alternative, the "commercial activity" exception applies.

III. SUBJECT MATTER JURISDICTION

The law requires the Court to maintain subject matter jurisdiction at all times. *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1207 (5th Cir. 1992). Any party or the court can raise issues of subject matter jurisdiction at any time. FED. R. CIV. P. 12(h)(3). With regard to foreign states, maintaining subject matter jurisdiction is particularly important because, unlike other litigants, foreign states are immune from jurisdiction in United States courts. *See* 28 U.S.C. § 1604. Immunity is not merely the right to avoid

liability; it also includes the freedom to remain exempt from the burdens of the judicial process. *See Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000). In observance of comity, the United States grants foreign states a presumption of immunity. *See Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240 (5th Cir. 2002). The presumption of immunity, however, may be rebutted in accordance with the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ("FSIA"). The FSIA applies to foreign states and their political subdivisions. *Id.* at § 1604. Can-Am does not dispute that the Republic is a foreign state and that the House is its political subdivision. Accordingly, the issue of subject matter jurisdiction turns on whether the FSIA rebuts the presumption of immunity enjoyed by the Republic and the House. Based on the facts before the Court, only two FSIA immunity exception provisions apply to this case. The first is section 1605(a)(1) ("waiver"). It applies to a foreign state that "has waived its immunity either explicitly or by implication, not withstanding any withdrawal of the waiver which the foreign state may purport to effect, except in accordance with the terms of the waiver[.]" *Id.* at § 1605(a)(1). The second is section 1605(a)(2) ("commercial activity"). A discussion on the commercial activity exception is below.

Citing the FSIA's waiver provision, Can-Am contends that no immunity exists because the House executed a pay order agreement that contained a waiver clause. After a thorough review, the Court finds that the alleged waiver is ineffective. The evidence before the Court clearly demonstrates that the House executed the alleged waiver in concert with the Bowers Cotton Group transaction. The documents for that transaction each use the reference

code: "House/9904-001." The alleged waiver is a clause within the unique pay order document for the transaction. In addition to identifying the specific transaction to which the pay order applies, the pay order explicitly states that "[u]pon execution of this agreement, this Irrevocable Payment Order will be executed, following settlement and clearance of funds into the Disbursement Account for the first and subsequent tranches[5]." Accordingly, the pay order was never executed because no House funds ever transferred to the disbursement account. In fact, the transaction ended with the House's decision to withhold its funds. Without the transfer of funds, there is no transaction and, therefore, no pay order. Hence, there is no waiver.

In fact, the alleged waiver was a limited waiver. The waiver applied only in the context of the Bowers Cotton transaction. The Court observes that the waiver is conditional. It's validity is conditioned on the funding of the Bowers Cotton proposal. That did not occur. Recall that the proposal's letter of intent explicitly states that the House's participation is ultimately subject to the Chief Secretary's approval of the contract. No evidence has been proffered that the Chief Secretary ever approved the contract to fund the Bowers Cotton proposal. In fact, the Chief Secretary's decision to withhold funding demonstrates the opposite. Hence, the Court finds that the Republic and the House have not waived their immunity under the FSIA section 1605(a)(1).

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[5] *Tranche*: "A bond issue derived from a pooling of similar debt obligations." Black's Law Dictionary 1503 (7th ed. 1999). The Bowers Cotton proposal was an attempt to pool a potential House investment with other investments to purchase an initial tranche.

Turning to the FSIA section 1605(a)(2), the Court has reviewed the parties' submissions and finds that the commercial activity exception does not apply to the Republic or the House. The commercial activity exception has three prongs. The first creates an exception of a foreign state carries on a commercial activity in the United States. 28 U.S.C. § 1605(a)(2). Section 1603(e) defines commercial activity. It provides that "[a] commercial activity carried on in the United States by a foreign state means commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e).

Can-Am has failed to present any document indicating that the Republic carried on any activity having substantial contact with the United States. The House's relevant activities included appointing Sorsby as its financial consultant and, thereafter, considering various investment proposals. However, none of these activities occurred in the United States. The House appointed Sorsby in Tobago and provided an office for her Tobago. The House also negotiated and executed the Memorandum in Tobago. No facts in the record indicate that the House considered any proposals in the United States. The record does, however, reflect that Sorsby arranged for proposals to be considered in England. Moreover, the record reflects that the House declined an opportunity to consider a proposal in New York. In sum, it is clear that no commercial activity occurred in the United States.

The second commercial activity prong creates an immunity exception if the action is based "upon an act performed in the United States in connection with the commercial activity of a foreign state elsewhere[.]" *Id.* Again, this prong does not apply because the facts do not identify a commercial act performed in the United States.

Finally, the third commercial activity prong precludes immunity when an action is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]" *Id.* The plaintiff alleges that the Republic and the House breached a contract to allow Sorsby to act as the House's financial consultant. Even if the Court allows that the Memorandum was a bona fide contract, it explicitly limits Sorsby's compensation to ten percent of monies earned from funding programs. The evidence fails to demonstrate that any monies were earned. In fact, Can-Am's contract claims arise from the House's decision not to fund the investment proposals that she presented. Considering that the House was never bound to accept any proposal, the fact that Sorsby did not make money on *her* investment is not a legitimate basis for a breach of contract claim. In any event, the House's unfettered decision to decline investment opportunities that could have enured to the plaintiff's benefit in this Country is certainly not a basis to assert that the Republic and the House caused a direct effect in the United States.

IV. CONCLUSION

In light of the discussion above, the Court finds that there is no basis to overcome the Republic and House's presumption of immunity. Accordingly, the Court lacks subject matter jurisdiction and this case must be DISMISSED.

It is so ORDERED.

Signed this 8th day of September, 2004.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District
Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20007

CAN-AM INTERNATIONAL, LLC

Plaintiff-Appellant

v.

THE REPUBLIC OF TRINIDAD & TOBAGO; TOBAGO HOUSE OF ASSEMBLY

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

(Filed Mar. 30, 2006)

Before GARWOOD, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Edward C. Prado
United States Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CAN-AM INTERNATIONAL, L.L.C.	§	
Plaintiff,	§	**Case No.: H-01-3897**
v.	§	
THE REPUBLIC OF TRINIDAD AND TOBAGO and the TOBAGO HOUSE OF ASSEMBLY	§	**Hon. Judge Kenneth M. Hoyt**
Defendants.	§	

AFFIDAVIT OF LAURA LEE SORSBY

BEFORE ME, the undersigned authority, a Notary Public in and for the State of Texas, on this day personally appeared Laura Lee Sorsby, known to me to be a credible person, who is known to me and who, being first duly sworn, upon her oath stated as follows:

1. "My name is Laura Lee Sorsby. I am over twenty-one (21) years of age, of sound mind and have never been convicted of any felony. I have personal knowledge of the facts stated herein and they are true and correct.

2. I have extensive experience with international financing arrangements as evidenced by the following letters of recommendation and other various documents:

a. Letter of recommendation from Bell & Murphy, L.L.C. incorporated hereto as Exhibit "A";

b. Invitation to join as Advisory Board member of USIACC incorporated hereto as Exhibit "B";

c. Letter of recommendation from Ms. Sermin Bahsis incorporated hereto as Exhibit "C";

d. Letter of recommendation from Zena International, Inc. incorporated hereto as Exhibit "D";

e. Letter of recommendation from Darinco Enterprises incorporated hereto as Exhibit "E".

3. In early 1997, through contacts in Houston, Texas at Shell Oil Company, I was introduced to representatives of the government of Trinidad and Tobago ("T&T"). At the request of T&T, I submitted my credentials to the Minister of Foreign Affairs, Ralph Maraj. In March 1997, I and other representatives of Can-Am, met with Mr. Finbar Gangar, Minister of Energy and Energy Industries at the time. At the meeting, discussions focused on funding programs for infrastructure financing for "Petrotrin", the Petroleum Company of Trinidad and Tobago Limited. Meetings between representatives of Can-AM international, Inc. ("Can-Am") which is a company I created in connection with some of my financial consultant activities, and representatives of Petrotrin continued well into the year 2000. I and other representatives of Can-Am, continued to meet with Mr. Rommel Charles, Colin Lucas and others from Port Authority until well into the year 2000. I and/or representatives of Can-Am, had meetings with Reeza Mohammed, the

Minister of Works and Transportation, and Mr. Ganga Singh, whom Can-Am understood to be the Minister of Telecommunications.

4. In 1998, I began marketing my services as a financial consultant to the Trinidad and Tobago. I met with representatives of T&T and THA, including Allan Richards, Chief Administrator of the Tobago House of Assembly ("THA"), in 1998. At about the same time, I was introduced to and begun [sic] working closely with Rennie Dumas, the business analyst for the THA. They requested that I send them information about Can-Am International, Inc. I provided such information, along with other information showing my credentials. This included my work with Cathay Consortium Limited, and the government of Malaysia.

5. On February 22, 1999, Hochoy Charles of the Tobago House of Assembly appointed me, as chief executive officer of Can-Am, as financial consultant for certain improvement projects. THA represented to Can-Am that it intended to proceed with the capital improvement projects with the participation of Can-Am. Can-Am relied on these representations to its detriment.

6. In my capacity as financial consultant, I reviewed numerous funding proposals for the benefit of the THA, including proposals from Global Strategies and Cathay Group. Altogether, I brought no less than 6 financial structures to the THA. However, in each instance, the THA, in violation of its responsibilities under the Memorandum of Understanding ("MOU"), failed to provide information, or to take appropriate actions, to complete the transaction. For instance, Can-Am proposed conventional financing with the Bank

of Montreal, but the THA failed to deliver a promised guarantee for the central government as collateral. Can-Am proposed revenue bond issues through both Raymond James and Gee and Jenson, but the THA failed to provide requested information to either group. Can-Am proposed funding through OPIC, but the THA failed to complete the application form.

7. One proposal that was apparently submitted directly to the THA came from a Jeffrey Matz. I rejected that proposal and recommended that the THA not pursue it. I have never met Jeffrey Matz. I have never had any dealings with him, and I have never done any business with him.

8. I contacted Hugh Hague, with whom I had worked before, to assist me in my efforts. Mr. Hague resides in Calgary, Canada, and is the president of Global Strategies, Inc. He also is a representative of Nikea, N.V. ("Nikea") in North America.

9. Nikea had an arrangement with a construction financing group and was contracted with a trading group that provided financing to underdeveloped countries. The fund manager for the investment/trading group was named Peter Newton. I presented the projects to Mr. Newton for the approval of his group.

10. The investor group required that I submit the projects to them for approval before they would agree to provide a commitment of any monies into a trade that would create financing for the THA. I submitted the projects to the investor group, and they were approved.

11. This Nikea proposal was submitted to Bower Cotton's client, the investment/trading group being managed by Peter Newton. The investment was very favorable to the THA because they would remain in an account over which the THA had sole signature authority. Moreover, the funds were to be backed by a bank guarantee. Finally, the return from this program would have been substantial. The program explained to us in London by Peter Newton required an investment of $100 million. I arranged a philanthropist willing to plead $100 million to the program for T&T and THA providing THA pledged 10% or $10 million to show their own good faith in the projects. Peter Newton arranged for this funding program to be arranged in Switzerland. Peter Newton was instructed to probe the THA bank account to provide the funds were on deposit as the requirement of the philanthropist.

12. In March of 1999, I recommended the Peter Newton/Nikea proposal to the THA. Accordingly, I arranged a meeting in London between myself, Mr. Newton, representatives of the THA, and others to discuss the proposal deal. We met at the offices of the Bower, Cotton firm.

13. About that time, I was contacted by Steven Vasak who had a proposal he wanted to make. He offered to come to London, at his own expense, and make his proposal to us while we were all in London. Mr. Vasak did so. However, I rejected Vasak's proposal, and recommended that the THA not pursue it. I have never had any other dealings with Mr. Vasak.

14. The THA representatives were impressed with the Peter Newton/Nikea proposal, and stated

their confidence in Mr. Newton. Accordingly, we proceeded with that proposal.

15. To go forward with the Peter Newton/Nikea proposal, I told Hochoy Charles that he needed to execute a letter of intent, a proof of funds letter, and signed and notarized pay orders. Hochoy Charles executed each of these documents with transaction codes specific to this transaction. Furthermore, Charles agreed to proceed with the Peter Newton/Nikea funding program, and agreed to invest $10 million into the trading program.

16. However, prior to the time that the Bower Cotton investor group was to invest its funds, it caused a bank probe to be performed which revealed that the THA funds had not been invested as promised. Because the THA reneged on its commitment to invest the funds, the funding program was lost.

17. I understand that the money that was intended to be invested by the THA into the funding program was redirected.

18. Can-Am continued to seek funding opportunities for THA and T&T with its knowledge and authorization. In July of 1999, I contacted THA concerning a funding program proposal from Gee & Jenson. On July 30, 1999, Allan Richards wrote to me to set up a meeting with representatives of Gee & Jenson. In August of 1999, I and two other representatives of Gee & Jenson met with Hochoy Charles and Allan Richards in Tobago. After that meeting, Hochoy Charles also asked me to assist in locating a ferry and arranging financing for its purchase. Mr. Elton Bobb of THA and I spent several days in Tobago gathering

information needed to solicit proposals for the ferry project. Beginning in August 1999, Can-Am was also pursuing potential funding programs through proposals made by Raymind [sic] James and Frankwell Investments. I was also communicating with Port Authority, regarding funding programs to financing port upgrades, and the Minister of Energy and Energy Industries regarding the Raymond James proposal. Throughout early 2000, I and a government representative worked together to set up meetings in Tobago to consider the funding programs being proposed by Raymond James and Frankwell Investments. I was also invited to the Global Friendship Forum as a guest arranged by Petrotrin, the government of Trinidad & Tobago's state owned company for infrastructure finance convention. In meantime, I continued my efforts to secure funding proposals for the ferry project. On March 16, 2000, Allan Richards issued a formal invitation for the meetings scheduled in Tobago for Raymond James and Frankwell Investments. During the same time period, the Chairman of the Port Authorities wrote to me requesting a funding program proposal by Raymond James, I and representatives of Raymond James and Frankwell Investments met with Hochoy Charles and other government representatives in April of 2000. However, after once again agreeing to go forward with a program, the government refused to provide the requested information to Raymond James to proceed with funding program proposal.

19. In 1999, I and Mr. Hague, a representative of Can-Am, moved to Trinidad & Tobago so that we would be more accessible to the THA. While in Tobago, we worked on the from and terms of the MOU and conducted meetings to discuss the requirements of

the private-placement funding program proposed by Bower Cotton. During that time, the local telephone number for Can-Am in Houston with Janice Cleavinger, the attorney who incorporated Can-Am and its registered agent.

20. As late as January 24, 2000, I was still soliciting and presenting funding proposals to T&T and THA. THA continued to do business with me and at no time did T&T, THA or any other government representative, ever cancelled [sic] my agency appointment and revoke the MOU.

21. It is my understanding that Dr. Steve Onoja and Benjamin Okpah [sic] are ministers. The address given in the Can-Am Articles of Incorporation for these individuals is to their church, which I understand to be their proper place of business. It was not my intention that Dr. Onoja and Mr. Okepah be included as managers of Can-Am when it was created. Accordingly, they were removed from any involvement with Can-Am at its first organizational meeting.

22. My married name was "Dorenbach." Subsequent to my divorce, I reverted to my maiden name, "Sorsby."

23. In the affidavit of Allan Richards, he describes an incident wherein the THA had been victimized by a group known as The Financial Consortium ("FiCon"). I did not have any involvement in that transaction. My understanding, however, is that it involved a situation where the THA transferred a substantial sum of money into the account of a third party.

24. Hochoy Charles asked me, in my capacity as a consultant for the THA, to assist him in locating the individuals who had taken the THA's funds,

and to locate counsel in the United States to bring a claim against FiCon. I recommended Robert McGrath through his wife. My understanding is that Mr. McGrath associated with counsel in Florida and assisted in prosecuting the FiCon matter to a successful conclusion on behalf of the THA.

25. I have expanded a substantial amount of effort and funds in my capacity as the Financial Consultant for the T&T and THA, and I invested a significant amount of time. However, I have not received any payment whatsoever from the T&T and/or THA. As a result of T&T and THA's wrongful conduct, Can-Am has suffered damages in excess of 10 million dollars, and out of pocket expenses in excess of $1.2 million.

FURTHER AFFIANT SAYETH NOT.

/s/ Laura Lee Sorsby
Laura Lee Sorsby

SUBSCRIBED AND SWORN TO BEFORE ME to certify which witness may hand and seal of office this 24th day of May, 2004.

[SEAL] COLLEEN AUSTIN
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
SEPT. 20, 2005

/s/ Colleen Austin
Notary Public,
State of Texas

[LOGO] Bell & Murphy
AND ASSOCIATES, LLC
5310 Harvest Hill Rd. • Suite 139 • LB 174 •
Dallas, TX 75130-5805
t 972-386-0752 f 972-386-5313
e www.bellandmurphy.com

April 26, 2004

Can Am International L.L.C.
Laura Lee Sorsby,
Houston, Texas

To Whom It May Concern:

Please be advised that Bell & Murphy and Associates, Exploration Consultants has been doing both domestic and international oil and gas exploration projects since 1964.

We have been closely associated with Ms. Laura Lee Sorsby, Managing Director with Can Am International L.L.C. since 1998 with projects in Malaysia, Indonesia, Russia, Somaliland Africa, Turkey, Japan, Oman and China.

Most recently Bell & Murphy and Laura Lee Sorsby, Can Am International, consummated a crude oil procurement Mandate Agreement with a Texas based refinery for international oil and gas allotments.

If you have any question, or if additional information is needed please do not hesitate to contact our offices in Dallas, Texas.

Regards,
BELL & MURPHY AND ASSOCIATES, L.L.C.

/s/ James A. Carroll
JAMES A. CARROLL P.C. [SEAL]
MANAGING DIRECTOR

[LOGO]

US INDIAN AMERICAN
CHAMBER OF COMMERCE
Washington DC
New York Office – 1979, Marcus Avenue,
Suite 210, Lake Success, New York 11042
Tel – 516 622 2322 Fax – 309 273 3672
www.usiacc.com

Ms. Laura Lee Sorsby,
Director,
Can-Am Investment Group, L.L.C.
Houston, Texas

02-23-2004

RE: Invitation to Join as Advisory Board Member of USIACC

Dear Laura,

USIACC is a non-profit forum with a Voice of Indian Business Community to the US Government and Policy-makers for getting a Fair share in the Grants, Jobs and Contracts for the Indian Business Community.

It gives me great pleasure to invite you to Join as advisory Board Member of USIACC.

Please sign below this letter as your acceptance to Join.

Best Wishes

Mickey Kalra
National President

Accepted to Join

/s/ Laura Lee Sorsby
(Surinder Rametra)
Date-02-23-04
Place – Houston

D14

12.07.2002

To Whom Concerned

Dear Sir

Laura Lee Sorsby was has been doing business and promoting business between Turkey and the United States, as well as in Oman and Russia. Ms. Sorsby has tried to promote business in our country to establish a large international markets for American firms and manufacturers in our region. Ms. Sorsby, the appointed Mandate for Age Refinery in San Antonio, Texas, Ms. Sorsby has been promoting Age Refinery in Turkey and the Middle East in order to supply oil and gas to the USA from the Middle East. Age Refinery is currently supplying jet fuel to the United States Military. Ms. Sorsby has always been honest and shown integrity in all business dealings.

As a financial mandated agent of many European groups, I appreciate Ms. Sorsby as being professional and trustworthy in all transactions.

Best Regards

Sermin Bahsis

/s/ Sermin Bahsis
Cell: 90 532
Tel: 90 216 3687924
Fax: 90 216 3683495

att: CV of Sermin Bahsis

SERMIN BAHSIS [LOGO]

ADDRESS/PHONE

Home : Hurriyer Kutlutas Sitesi B Blok D 31
Kozyatagi Istanbul Turkey

Residence : ☎ 90 (216) 368 79 24

Mobile : 90 (532) 265 74 47

Fax : 90 (216) 368 34 95

E-mail : sermin@atlat.net.tr

BIRTH DATE/PLACE

- ✓ 10.01.1961
- ✓ Adana

MARITAL STATUS

- ✓ Single

AREAS OF EXPERTISE

- ✓ Management of International Trade (Market Research, Organization, Marketing, Operation
- ✓ Management of Interdisciplinary Professionals (Financial, Marketing, Operation and Training)
- ✓ Management of coordination in Stock Exchange Market

PROFESSIONAL SKILLS

Management

- ✓ Staff development and training
- ✓ Seminar planning and presentation
- ✓ Performance appraisal and coaching

Marketing Management

- ✓ **Market, Research, Analysis and Strategy Generation**
- ✓ Competitive Pricing and Cost Analysis
- ✓ Product Presentation, Customer Relations and Loyalty Development

Financial Management

- ✓ **Financial and Operational Data Analysis**
- ✓ Credit Risk Evaluation
- ✓ Stock Exchange Operation

EDUCATION

- ✓ **MBA – Manchester School University of Whales (frozen)**
- ✓ Bachelor of Science (BS) Economics
- ✓ Bosphorous University
- ✓ Saint Benoit – French School

MAJOR POST GRADUATION STUDIES

- ✓ **UBS (1988) Seminar on Methods of Security Performance and Payment in International Trade**
- ✓ Midland Bank International London (1989) – Finance and Lending Interpretation at Balance Sheets, Foreign Exchange and International Capital Markets, Export Finance, Documentary Letters of Credit, Bank Guarantees
- ✓ CIBS – Center for International Banking Studies-Istanbul
- ✓ Assets Liabilities Management (1992) Financial Analysis
- ✓ Various courses given by Turkish Foreign Trade Bank (Credits, International Trade Products, Imports, Stock Exchange Market, Bonds, Guarantees etc.)

EXPERIENCE

30.04.2002-present : Mandated Marketing Agent of financials institutions

08.08.2001- 30.04.2002	: Dizayn Group Marketing Coordinator in Europe & America Swiss Company – General Manager
01.02.2000- 08.08.2001	: International Trade (petroleum, wheat flour, sugar..) trade financing, market research, etc
01.09.1997- 01.02.2000	: Arctech Group Arctech Welding Electrodes, Welding Wires Industry Inc Export Management Pera Finansal Kiralama Hizmetleri AS (Leasing) **General Manager** Pera Faktoring Hizmetleri AS (Factoring) General Manger
1.02.1996- 31.08.1997	: Evgin Menkul Degerler As (Stock Exchange) Inspection & Coordination
01.04.1995- 31.01.1996	: Gedik Menkul Kiymetler As (Stock Exchange) Kadikoy Branch Manager
01.01.1995- 31.03.1995	: Turkish Foreign Trade Bank Ciftehavuzlar Brach [sic] Manager
01.04.1994- 31.12.1994	: Turkish Foreign Trade Bank (DISBANK) Karakoy Branch – Acting Manager
01.04.1990- 31.03.1990	: Turkish Foreign Trade Bank (DISBANK) Karakoy Branch – Credit Marketing Department Pro-Assistant Manager-Assistant Manager
01.05.1986- 01.04.1990	: Turkish Foreign Trade Bank (DISBANK) Training Department

ACTIVITIES

- ✓ Sports (Tennis, Ski)
- ✓ Music (Piano)

LANGUAGES

- ✓ English
- ✓ French

[LOGO] **ZENA**
International, Inc.

Tel: (706) 561-2500569-3025

P.O. Box 9512 Fax: (253) 679-5907
Columbus, GA 31908-9512, USA
E-mail: ZENA.Inc@Home.com
Web Page: WWW.ZENAINTL.COM

To whom it May Concern

July 15, 2002

Reference: Ms. Laura Sorsby, Can-Am International L.L.C.

Dear Sirs:

I have a great pleasure to write on behalf of Ms. Laura Lee Sorsby of Can-International, L.L.C., an American Consulting Group, Houston, Texas. I have known Laura Lee Sorsby for several years and we have been involved in entrepreneur projects such as crude oil, refined petroleum products as well as structuring finance for infrastructure projects.

She has been open, flexible and honest in conducting a successful business. She is prompt, precise and direct to the point. She is energetic and a capable individual who is able to turn projects into success. I enjoyed working with her, her partners and staff over the years and I am looking forward to doing many more exciting projects in the future.

For more information, please do not hesitate to write or call.

/s/ Zeki Al-Saigh Zeki Y. Al-Saigh
[SEAL] President

Resume

Dr. Zeki Y. Al-Saigh

NAME: Zeki Y. Al-Saigh

MEMBERSHIP: American Chemical Society, Royal Society of Chemistry, Alpha Chi Sigma, Alpha Lambda Delta, and Chi Beta Phi

Degrees

Ph.D. Physical Chemistry, 1973, University of Birmingham, U.K.

B.S. Chemistry, 1967, University of Mozul

Experience

– 1998 President, ZENA International, Inc., Columbus, GA, International trading in crude oil, refined petroleum products, Environmental Chemical testing and consulting

– 1998 Co-partner in OASIS consulting group, Columbus, GA. Purification and testing of bottled drinking water. Certification and licensing of bottled drinking water.

– 1995 President, Chemical Consulting and Services, Inc. Austin, Texas. Custom research and problem solving in Chemistry

– 1999 Professor of Chemistry, Dept. Of Chemistry and Geology Columbus State University, Columbus, GA 1995 Chairman and Professor, Dept. of Chemistry and Geology, Columbus State University, Columbus, GA 1990 Chairman and Associate Professor, Dept. of Chemistry and Geology, Columbus State University, Columbus, GA

1986 Head of Chemistry Department and Associate Professor, University of Charleston, WV

1985 Assistant Professor of Chemistry, Cameron University, OK

1984 Lecturer in Chemistry, University of Texas, Austin, TX

1983 Postdoctoral Research Associate University of Texas, Austin, TX

1982 Postdoctoral Research Associate, Trinity University, TX

1981 Postdoctoral Research Associate, North Texas State University

1974-1980 Assistant Professor, University of Mozul

Summer Research Experience

1975 University of Birmingham, UK

1979 Max-Plank Institute, Germany

1986 Case Western Reserve University, Ohio

1994 Georgia State University, GA

Publications

Forty Eight papers published in National and International Journals, among them are: Macromolecules, Polymer, Physical Chemistry, Organic Chemistry, Chemical Physics Letters, Trans. Farad, Society, Coordination Chemistry and Fluorine Chemistry.

[LOGO] **DARINCO ENTERPRISES SDN BHD**
(385576-H)

Our Ref: DESB/0049/AGA-kl

Date: 10th July 2002

To Whom It May Concern

Ms. Laura Lee Sorsby

I have known Ms. Laura Lee Sorsby for many years. We have participated in business together and Ms. Sorsby has worked very hard to promote trade between The Malaysia and the United States of America for many years. I am pleased to advise you that we Darinco Enterprises Sendirian Berhad are not a partner in the United States with Ms. Sorsby.

We are excited to be involved with Ms. Sorsby and her colleagues. We have the utmost respect for her in our country. We hope our jointly-owned company as well as Ms. Sorsby's other companies, will promote trade between the USA and Malaysia. Ms. Sorsby has worked with Malaysia for many years. Through her hard work, determination, dedication, and honesty, we are now in a good position to put many things in place at both Government and Corporate Levels. This will give business opportunities to both American Companies and Malaysian Companies. Please see Darinco Enterprises Brochures and Profile. We have passed all the approvals and are registered to bid for supplies, to submit financial proposals for government projects, as well as bid for construction projects and supplies when the Malaysian Government puts out the tenders for such projects. We look forward to working with ms. Sorsby and giving USA manufacturers, financial and EPC firms as well as oil and gas refineries

the opportunity to work with our country with our group under the guidance of our partner Ms. Sorsby.

Yours sincerely,

DARINCO ENTERPRISES SDN.BHD.

/s/ Dato Abdul Ghani bin Awang
Dato Abdul Ghani bin Awang
Executive Chairman

[STAMP]

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CAN-AM INTERNATIONAL, L.L.C.	§	
Plaintiff,	§	**Case No.: H-01-3897**
v.	§	
THE REPUBLIC OF TRINIDAD AND TOBAGO and the TOBAGO HOUSE OF ASSEMBLY	§	**Hon. Judge Kenneth M. Hoyt**
Defendants.	§	

AFFIDAVIT OF MOHAMMED MOHAMMADI

On this day, Mohammad Mohammadi appeared before me, the undersigned notary public. After I administered an oath to him, upon his oath, he said:

> "My name is Mohammad Mohammadi. I am over 21 years of age and am competent to make this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.
>
> I have been involved in international business and finance for over 20 years. As a part of my work, I represent and manage an investment fund which has a value well in excess of $100 million dollars. Although the fund's investments are varied, one of its interests is investments aimed at raising necessary funds for the financing of infrastructure projects in developing nations.

I have known and conducted business with Ms. Laura Lee Sorsby since 1995. In March of 1998, Ms. Sorsby, representing Can-Am International, L.L.C., approached me about using a portion of the funds that I manage to aid in the financing of certain projects in the country of Trinidad & Tobago. Although we discussed many opportunities in the country, Ms. Sorsby primarily discussed specific projects to be built on the island of Tobago. She educated me on the potential of the projects and the future potential for business opportunities related to the projects in question for other companies in which the fund has an interest.

Based upon my trust in Ms. Sorsby, her appointment through Can-Am International, L.L.C., as Agent and Financial Consultant for Trinidad & Tobago by the Tobago House of Assembly, my analysis of the potential for making money not only through investment, but also potentially through construction contracts, and the availability of established private placement investment programs specifically targeted to benefit developing nations, I made the decision on behalf of the fund that I control to invest in the future of the country of Trinidad & Tobago. I advised Ms. Sorsby that I had $100 million available to use in conjunction with Trinidad & Tobago as an investment in private placement funding programs or to use as private funding to finance the projects discussed in Tobago. I understood that Ms. Sorsby would find an appropriate program for investment, and that failing to find a program that she deemed satisfactorily secure, would make the funds available to Trinidad & Tobago in the form of private financing with standard interest rates for like private

financing. The former funding program would allow my fund, as well as Trinidad & Tobago, to earn investment profit and generate money for financing of projects. The latter would allow my fund to make investment profit by charging interest for the use of its money and make our private funding available for the financing of projects in the country.

Ms. Sorsby arranged for an investment program through Bower Cotton in London which was acceptable to me. A later program through Bower Cotton, which was arranged without Ms. Sorsby's participation, would not have been acceptable. The first program was far more secure and protected our investment. Although the $100 million was available to Trinidad & Tobago through Ms. Sorsby, Ms. Sorsby advised me that the government had reneged on its agreement to put up $10 million as a co-participant in the private placement funding programs we had discussed and ultimately refused to accept any funds arranged by Ms. Sorsby and Can-Am International, L.L.C. Trinidad & Tobago's refusal to accept any funding program or private funds arranged for the country by Ms. Sorsby and Can-Am International, L.L.C. was the sole reason that my fund did not advance the $100 million for their use and benefit as agreed."

/s/ MOHAMMAD MOHAMMADI
MOHAMMAD MOHAMMADI

SWORN TO and SUBSCRIBED before me by MOHAMMAD MOHAMMADI on May ___, 2004.

_____
Notary Public in and for the State of _____

E4

Official Certification

Seen for authentication of the reverse side signature, affixed in our presence by Mr. Mohammad MOHAMMADI, born 25.03.1958. citizen of Canada, according to his information residing at Bachtobelweg 6, 8045 Zurich, identified by passport.

This legalization refers only to the signature and not to the contents or validity of the document.

Personal signature confirmed only; authorization to sign on behalf of the firm not verified.

Zurich, 21th May 2004
BK no. 41562/rc
CHF 20.

[Seal]

NOTARIAT ZURICH
(ALTSTADT)

/s/ J. Inglin

J. Inglin, Notariatssekretarin mbA
mit Beglaubigunsbefugnis

APPENDIX F

IRREVOCABLE PAYMENT ORDER CONFIRMATION

This Irrevocable Pay Order Confirmation is subject to the terms and conditions as herein set forth and is a full recourse commercial commitment pay order instrument issued under penalty of perjury and shall be governed by the laws as set forth by the International Chamber of Commerce (ICC) Current Edition, rules of conciliation and arbitration (latest amendment)

Date 30th April 1999

Reference THA/99/04/001

Subject Private Investment Placement(s)/ by **The Tobago House of Assembly, Scarborough, Tobago, West Indies (To include a first investment of US$10.00 Million and ANY AND ALL** further investments as may occur.

Disbursement Schedules

Of the total value of the Transaction under the above Reference code payable to the beneficiaries named in the signed and engrossed schedules annexed hereto without protest or delay without deductions and free of taxes, bank charges and/or fees.

Schedule for the disbursement instructions which will be lodged with the Disbursement Account prior to commencement and acknowledged and confirmed.

1. A total of 10% (Ten Percent) of the act disbursable profits received by The Tobago House of Assembly or any

Company on their behalf to facilitate the investment transaction, payable for each tranch [sic] to the disbursement account as per Appendix One.

We the Signatory undersigned hereby irrevocably guarantee with the full personal responsibility and authority that upon the closing and clearance of funds into the client disbursement account on each and every tranche [sic] in the above referenced transaction, we will instruct payment to the beneficiary named herein.

The Irrevocable Pay Order is valid upon commencement of the start of the transaction herein, and shall remain valid and enforceable for the full term of this transaction and shall apply to any and all terms and conditions as may be agreed between the parties, their shareholders and/or assignes pertaining/relating to this transaction.

It is unconditional, transferable, assignable and divisible. The Reference code and all/any other identification codes, Banks, Fiduciary or Trusts, shall remain the same not being changed without written consent of all participants, including all renewals, extensions, rollovers, additions.

All parties hereby agree and guarantee not to circumvent any of the parties to this transaction for a period of three (3) years and renewable automatically for a further three (3) years and shall comply with all aspects of the non-circumvention ICC regulations and will apply with all aspects of the Pay Order from the date of execution of the aforementioned Pay Order.

Ref THA 99/04/001

Beneficiary _____ Signatory Hochoy Charles

This document binds all parties, their employees, associates, transfers, assigns and/or designees. Any facsimile of

this document shall be deemed as legal and binding on all parties hereto and shall be so construed to any court of law regardless of State, nation or Province waiving all rights of immunity, regardless of whether diplomatic, sovereign or otherwise, which shall give this document full force and legal effect to true purpose and intent of this agreement as so construed by its signing parties.

Upon execution of this agreement, this Irrevocable Payment Order will be executed, following settlement and clearance of funds into the Disbursement Account for the first and subsequent tranches [sic]. Commission payment for each and every subsequent tranche [sic] thereafter shall be after settlement and clearance of funds into the Disbursement Account.

In the event this stipulation is not adhered to, the injured party shall be entitled to seek full remedial action and suitable indemnity as imposed by law, we hereby warrant, agree and guarantee with full personal and corporate responsibility and authority, to maintain this Irrevocable Pay Order with the Transaction Disbursement Account.

Beneficiaries:

Ms Laura Lee Sorsby (Passport USA No:132830279)
Can-Am International LIC
2530 Townhall Lane
Katy
Texas USA

/s/ Hochoy Charles
Signed for and behalf of Tobago House of Assembly

Name: The Honourable Hochoy Charles

Title: Chief Secretary, Tobago House of Assembly

I hereby certify that on the 30th day of April 1999, the above named subscribers appeared in person and proved their identity to me by valid identification consisting of a passport, numbered and issued as specified above. Said parties executed this document signed and declared by themselves in my presence as the Irrevocable Payment Order and gave affirmation under the penalties of perjury that the facts and statements contained herein are true and correct and that they acknowledged that they freely said voluntarily executed the foregoing for the purposes specified herein.

Witnessed and Acknowledged by:

Name Cewill E. Denoon
CEWILL E. DENOON
COMMISSIONER OF AFFIDAVITS
TOBAGO
10/5/99
Beneficiary ___THA 99/04/001 Signatory Cewill E. Denoon

IRREVOCABLE PAYMENT ORDER CONFIRMATION

APPENDIX ONE

DISBURSEMENT ACCOUNT

TO:) LAURA LEE SORSBY

BANK:)

BRANCH:) To be advised

ACCOUNT NO:)

REFERENCE:) THA 99/04/001

SUBJECT: Project Investment Contract/s For The Tobago House of Assembly, Tobago, W.I.

/s/ Hochoy Charles
For the Signatory
Name: The Honourable Hochoy Charles

/s/ Laura Lee Sorsby
Confirmation of Acceptance by Laura Lee Sorsby

Ref THA 99/04/001
Beneficiary /s/ LS Signatory /s/ Hochoy Charles

APPENDIX G

[SEAL]

Office of the Chief Secretary,
Tobago House of Assembly,
Jerningham Street,
Scarborough,
Tobago.

Fax. No. 639-5374
Tel. No. 639-2696

19th April, 1999

Mr. Peter Newton
Programme Manager
36 Whitefriars Street
London

Dear Sir

Letter of Exclusivity – Reference Code THA/9904-001

I HOCHOY CHARLES, Chief Secretary and Secretary for Finance, bearing Trinidad and Tobago passport no. D000691 of Tobago House of Assembly hereby with (herein after referred to as the affiant) full corporate, personal and legal responsibility under penalty of perjury of law, represent and attest that:

I, the undersigned, or any other principal party involved in this transaction, do not have any other party working or authorized to work with those funds allocated for the above mentioned reference code. Nor have any other party authorized to invest these funds, or have other funds from myself or the corporation placed with other parties for a similar investment program.

I, the undersigned, herewith grant the trade program manager/administrator/facilitator full exclusive right as

our sole agent for 20 banking days from the above date, to enter these funds for me, or the corporation into the best available bank-secured investment program. Further I attest that I have sent cease and desist notices to any other intermediaries or trade groups that have had our paperwork in the past.

I, the undersigned understand, and I am fully aware that this transaction will be registered with a major world bank and/or the Federal Reserve bank and the submitted private and confidential paperwork under reference code_THA/9904-001 will be forwarded for the sole purpose of establishing necessary dossier due diligence and clearance for this transaction.

Facsimiles of this statement are deemed as legally binding as delivered originals.

All statements herein are under penalty of perjury, so stated on this date the 19th day of April 1999, grantor.

HOCHOY CHARLES
Chief Secretary and Secretary for Finance passport no. D000691 issued by Ministry of National Security of Trinidad and Tobago, expires on 26/2/2002.

Notary

This instrument was acknowledged before me
This 30th day of April 1999

By C. E. Denoon, Commissioner of Affidavit in the City of Scarborough, Trinidad and Tobago.

Witnessed by my hand and official seal

G3

CEWILL E. DENOON
COMMISSIONER OF AFFIDAVIT
TOBAGO

Seal: My commission expires 31/12/1999

G4

[SEAL]

Office of Chief Secretary,
Tobago House of Assembly,
Jerningham Street,
Scarborough,
Tobago.

Fax. No. 639-5374
Tel. No. 639-2696

19th April, 1999

Mr. Peter Newton
36 Whitefriars Street
London
EC4Y8BH

Dear Sir

Non-Solicitation Letter and Request for Information – Reference Code THA/9904 – 001

I, HOCHOY CHARLES, Chief Secretary and Secretary for Finance, acting for and on behalf of the Tobago House of Assembly, bearing passport no D000691, authorised signatory of Tobago House of Assembly do hereby confirm that I have requested, or are hereby requesting from your organization specific confidential information regarding a current available private placement bank-secured investment program to serve our interest and purposes and not for further distribution.

I hereby agree to keep all information strictly confidential and will not disclose it to any other party. I hereby declare that I am fully aware that the information received from you is in direct response to our request and is not considered or to be intended to be a solicitation of any kind, and it is intended solely for our general knowledge only. I hereby affirm under penalty of perjury that I have requested this

specific information from you and your organization of my own choice and free will.

I understand that the contemplated transaction is strictly one of private placement and is in no way relying upon existing regulations relating to the United States Security Act of 1933 amended or related regulations and does not involve the sale of securities. I further declare that I am not a licensed securities broker or government employee and understand that neither are you or your organization.

I mutually agree that this private placement transaction is exempt from the Securities Act and is not intended for the general public. All materials are for private use only.

It is understood and agreed that the ICC non-disclosure/non-circumvention rules apply to this letter of intent/transaction and I hereby agree to the current applicable standards of the International Chamber of Commerce.

I hereby confirm that neither the program administrator nor anyone on their behalf has solicited me in any way, and that no document received or that I will receive shall be deemed to be a solicitation. Additionally, I confirm that there has not been any offer to buy or sell securities and that there is not intended to be an offer to buy or sell securities.

It is agreed that a facsimile or telefax copy of this letter of intent, the proof of funds or any other associated documents are as valid and legal [sic] binding as the delivered original.

All statements herein are made under penalty of perjury.

HOCHOY CHARLES, CHIEF SECRETARY and Secretary for Finance, passport no. D000691 issued by Ministry of National Security of Trinidad and Tobago, expires on 26/2/2000.

Notary

This instrument was acknowledged before me

This 30th day of April 1999

By C. E. Denoon, Commission of Affidavits in the City of Scarborough of Trinidad and Tobago.

Witnessed by my hand and official seal

CEWILL E. DENOON
COMMISSIONER OF AFFIDAVIT
TOBAGO

Seal: My commission expires 31/12/1999

G7

[SEAL]

Office of Chief Secretary,
Tobago House of Assembly,
Jerningham Street,
Scarborough,
Tobago.

Fax. No. 639-5374
Tel. No. 639-2696

19th April, 1999

Mr. Peter Newton
Programme Manager
36 Whitefriars Street
London
EC4Y8BH

Dear Sir

Letter of Intent – THA/9904-001

I, HOCHOY CHARLES, Chief Secretary and Secretary for Finance acting for and on behalf of the Tobago House of Assembly, bearing Trinidad and Tobago passport no. D000691 hereby confirm and attest with full legal and corporate responsibility, under penalty of perjury, that I am ready, willing and able to enter $ Ten Million US dollars for participation into a private bank-secured investment programme, subject to my approval of the contract. I attest and warrant with full responsibility that the herein referred funds are good, clean, cleared funds that have been legitimately earned or obtained and of non-criminal origin, that the funds are free and clear of any liens or encumbrances, that the funds are under myself without consent of my third party.

As evidence of my funds being available for participation in the initial amount of US $10 Million I have enclosed

with this exclusive letter of Intent and authority a copy of my latest bank statement for funds on deposit and/or a bank proof of funds letter.

I attest and warrant that I HOCHOY CHARLES, have bank-acknowledged signatory control, possession and title over these funds in this account, 95010035670 and signatory power for any agreements, that result from this proof of funds. I hereby authorize you and your banker to verify and confirm the herein referenced funds. My bank officer's name is Mr. Charles Mitchell his Tel. No. is 868-639-3485 and fax no. is 868-639-3857.

I herewith grant you the exclusive right to provide me with the best available investment program to facilitate the private placement of these funds. I attest that I have no other person(s) authorized to invest these specific funds into a similar program. It is understood and agreed that the ICC non-disclosure/non-circumvention rules apply to this letter of intent and the entire transaction and I hereby irrevocably agree to the current applicable standards of the International Chamber of Commerce.

I hereby confirm that neither the program administrator nor anyone on their behalf has solicited me in any way, and that no document received or that I will receive shall be deemed to be a solicitation. Additionally I confirm that there has not been any offer to buy or sell securities and that there is not intended to be an offer to buy or sell securities. It is agreed that a facsimile or telefax copy of this letter of intent, the proof of funds or any other associated documents are as valid and legal [sic] binding as the delivered original.

All statements herein are made under penalty of perjury.

HOCHOY CHARLES, Chief Secretary and Secretary for Finance, passport No. D000691 issued by Ministry of National Security of Trinidad and Tobago, expires on 26/2/2000 date.

Notary

This instrument was acknowledged before me Hochoy Charles

This 30th day of April 1999

By C. E. Denoon Commissioner of Affidavit in the City of Scarborough, Trinidad and Tobago.

Witnessed by my hand and official seal

CEWILL E. DENOON
COMMISSIONER OF AFFIDAVIT
TOBAGO

Seal: My commission expires 31/12/99

APPENDIX H

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (herein referred to as the "MOU") dated the 27th day of MARCH in the Year of Our Lord One thousand Nine Hundred and ninety-nine, by and between:

PARTY OF THE FIRST PART:

The TOBAGO HOUSE OF ASSEMBLY, whose address for the purpose of this MOU is

1 JERNINGHAM STREET SCARBOROUGH TOBAGO (Herein referred to as "THA");

And

Laura Lee Sorsby, CEO of CAN-AM INTERNATIONAL L.L.C., a limited liability company organized under the laws of the State of Texas, USA, which address for the purpose of this MOU is Laura Lee Sorsby, 2425 Townhall Lane, Katy, Texas, U.S.A. 77449 (hereinafter referred to as "the Financial Consultant", (CEO of CAN-AM).

RECITALS:

Whereas, the Financial Consultant, has certain expertise in financing and coordinating of government projects; and

Whereas, THA is considering for financing the following critical development projects outlined in the Tobago Development Plan to consist of, but not limited to:

- THE SOUTHWEST WASTE-WATER TREATR-MENT [sic] PLANT
- THE BELMONT ROAD-HIGHWAY

- THE RICHMOND WATER SUPPLY AND TREATMENT FACILITIES; and

WHEREAS, THA has appointed, the Financial Consultant, as the financial consultant for the projects, with the authority and responsibility to oversee the financing process on behalf of the Assembly; and

WHEREAS, the parties anticipate a productive relationship and desire to formalize their understanding of each party's obligations and benefits.

NOW THEREFORE, in consideration of the mutual benefits accruing hereunder and the mutual covenants contained herein, the Parties agree as follows:

I. RESPONSIBILITIES OF THA'S CONSULTANT LAURA LEE SORSBY

1.0 In connection with the appointment dated 22nd February, 1999, appointing Ms. Laura Lee Sorsby, CEO of CAN-AM, as financial consultant for the projects named, but not limited to, the authority and responsibility to oversee the financing process for the named projects, which responsibilities include the following:

a. Introducing different financing structures to THA for government review and selection.

b. Arranging the funding institution, for financing and placement of accounts, subject to THA approval.

c. Providing contractual arrangements with programme managers of trading groups acceptable to the THA showing the traders ability to create this type financing.

d. Negotiating, subject to the approval of THA, the interest rates payable on the funds held in the Government's account if THA pledges or blocks funds for the program selected to finance the identified projects.

e. Arranging for the profits generated by the financing program to go into a THA trust account for the payment of expenses related to the financing and for disbursements to the named projects acting as paymasters on [sic] upon approval of the THA.

f. Working with THA to arrange collateral, if required, for the financing program selected by THA.

g. In the event of conventional financing, arranging the lowest interest rates available on behalf of the THA for its selection and approval, taking into consideration all the terms of the loan.

h. Working jointly with THA for coordinating the identified projects for financing and for disbursing the funds for infrastructure projects.

i. Working jointly with THA selecting construction firms and taking bids that will be submitted to THA.

These responsibilities shall be performed subject to the conditions that:

1.1 All matters that require financial commitments by the THA shall be brought to the notice of the THA for agreement before any final commitments are made.

1.2 All schedules of payments and money management shall be determined and pursued only with the agreement of the THA, but the THA shall retain an open book policy with the Consultant.

1.3 The Financial Consultant or an appropriately identified and appointed agent of CAN-AM shall be available to the THA, or its appointed agents, at all times.

1.4 The agency appointment will remain in effect from the time trading begins or as long as THA is receiving funds through any trading programs of financial arrangements provided by the Financial Consultant or through any Clients introduced by Consultant.

1.5 This agency appointment can only be revoked in writing if the Financial Consultant fails to perform on the terms of this MOU.

II. RESPONSIBILITIES OF THA

2.0 In order to facilitate the efforts of the Financial Consultant in arranging financing for the named projects, the THA agrees as follows:

a. To provide the most feasible and high priority projects for financing

b. To get all necessary government approvals as requested by the Financial Consultant in order to implement the financing program selected by THA from those submitted by the Financial Consultant.

c. To execute all documents necessary to implement and carryout the selected financing program; including but not limited to, bank and trading agreements and all necessary

pay orders to be signed by government officials and lodged with the Trustee at the Trading Bank or other financial institution at the signing of the contract and before trading commences.

d. THA will arrange all necessary government collater as required to implement the selected financial program.

III. JOINT RESPONSIBILITIES

3.0 The parties agree that: If required, the Financial Consultant and THA will travel together to make the appropriate banking arrangements in order for THA to enter into the trading program.

a. The Financial Consultant and THA will jointly oversee the construction of the projects with the funding provided through the Financial Consultant's efforts. ~~With~~ [/s/ HAC] The THA and Consultant will act as JOINT PROJECT COORDINATOR.

b. An appointed Trustee of the Trading Bank (Trustee) will preside over THA Trust Account or Accounts containing the profits generated from private placement or other funding programs. A minimum of two signatures from the government shall be needed for disbursements. THA will allow the Financial Consultant to oversee disbursement with THA and the Financial Consultant will be allowed to review the account and returns jointly with THA.

IV. FEE AGREEMENT

4.1 For the services of financial consultant, THA agrees to pay the Financial Consultant a fee equal to ten percent (10%) of all monies earned from the private placement (or other funding programs) out of funds provided to THA generated by the funding program arranged by the Financial Consultant. This fee is to be paid ~~to~~ [/s/ HAC] directly to the Financial Consultant by the Trustee. The Trustee will then disburse profits of the private placement (or other funding programs) as the profits are realized, that is, on an approximately weekly basis or any time THA has disbursed any funds from the trade or loans. THA agrees to cooperate with the Financial Consultant in executing all documents required by the Trading Bank or other financial institutions to disburse the said fee to the Financial Consultant as agreed above. THA agrees to file a properly executed fee agreement and/or pay order authorizing payment of the said fee to the Financial Consultant. This authorized payment will be lodged with the Trading Bank or Trustee or another financial institution, prior to the funding or trading program is initiated, or a contract has been signed by THA entering THA into the program.

4.2 The Financial Consultant may charge a fee, to be approved by THA, for the services as project Coordinator. Such fee is to be negotiated for each project and based on the complexity of the project and the services to be performed by the Financial Consultant.

4.3 In the event that THA selects a form of conventional financing from the financing structures submitted by the Financial Consultant, the parties shall negotiate prior to the closing of the conventional financing a fee agreeable to both parties to

compensate the Financial Consultant for the services in arranging such financing. The fee to be payable upon closing.

V. CONFIDENTIALITY

5.1 Each of the parties agree to protect and not disclose, either directly or indirectly the Confidential and Proprietary Information disclosed by the other party without the prior, express written consent of the furnishing party. For the purpose of the MOU, "Confidential and Proprietary information" shall include, but to be limited to, any and all business-related disclosures made by each to the other. Whether such disclosures are made directly or indirectly, including business methods, financial assets, financing sources, individuals and/or private and government entities disclosed, introduced, or made known to, any of the parties by any other party, and shall include telephone numbers, addresses, telex, fax numbers, "e-mail" address, et al disclosed to a party by another party hereto. The parties will not in any manner make, solicit or accept any business from sources, individuals, and private and governmental entities made known to them by or through another party hereto without express, written permission if the party who disclosed, introduces or made known said source, individual, and entity.

5.2 This Confidentiality agreement does not apply to those companies, individuals, entities, and/or trusts, with which any of the parties hereto have had, or continue to have confirmed, verifiable, independently established business relations which predate this MOU. To establish such exclusion, verification of said relationship(s) and date(s) thereof must be presented in writing, and documented to

the other party within thirty (30) days after said excluded party is revealed.

VI. DURATION

6.1 This MOU shall remain in effect as long as THA is receiving funds through any trading programs or financial arrangements provided by the Financial Consultant.

6.2 In any event the Financial Consultant shall continue to receive payments of the agreed fee of ten percent (10%) of all monies generated by funding programs, submitted by the Financial Consultant, and entered into by THA. This is up to and including the expiration date, of this MOU, as amended from time to time, so long as the said funding program is in effect and generating funds on behalf of THA.

VII. NOTICES

7.0 All notices to be given by a party under this MOU shall be either delivered personally or sent by prepaid airmail, facsimile or by e-mail to the address of the other party as shown below, which address may be modified from time to time by giving the other party written notices.

The Tobago House of Assembly
Attention: HOCHOY CHARLES ESQ.
Address: 1 JERNINGHAM STREET,
SCARBOROUGH
TOBAGO
Telephone: 1 868 639-2696
Facsimile: 1 868 639-5374
E-mail:

Can-Am International, L.L.C.
Attention: Laura Lee Sorsby
Address: 2520 Townhall
Katy, Texas
77449
Telephone: 281-347-0685
Facsimile: 403-547-4108
E-mail: LALAG64080

VIII. MISCELLANEOUS

8.1 This MOU and all amendments thereto shall be governed and constructed in accordance with the laws of the Republic of Trinidad and Tobago.

8.2 No supplement, modification or amendment of the MOU shall be binding unless executed in writing by the parties.

8.3 This MOU may not be assigned without the prior written approval of the parties.

IN WITNESS Whereof, authorized representatives of the parties hereto have executed this document as shown below.

THE TOBAGO HOUSE OF ASSEMBLY

By: /s/ HCharles

FINANCIAL CONSULTANT FOR
TOBAGO HOUSE OF ASSEMBLY

BY: /s/ Laura Lee Sorsby

APPENDIX I

TOBAGO HOUSE OF ASSEMBLY

Office of the Chief Secretary
Tobago House of Assembly
Scarborough [SEAL]
Tobago

Fax No.: 660-7653
Tel. No.: 660-7063/64/65
E-mail: pordii@tstt.net.tt

22nd February, 1999

Ms. Laura Lee Sorsby
C/o Janice J. Cleavinger
5341 Pagewood Lane
Houston
Texas 77056

Dear Ms. Sorsby,

The Tobago House of Assembly proposes to secure financing for identified critical development projects outlined in the Tobago Development Plan.

The projects being considered for financing are:

- **THE SOUTH-WEST WASTE-WATER TREATMENT PLANT**
- **THE BELMONT ROAD-HIGHWAY**
- **THE RICHMOND WATER SUPPLY AND TREATMENT FACILITIES**

The Chief Secretary and Secretary for Finance and Planning, on behalf of the Executive Council, has agreed to appoint you, Ms. Laura Lee Sorsby, CEO of Can-Am International L.L.C. as the financial consultant for the projects, with the authority and responsibility to oversee the financing process, on behalf of the Assembly.

This appointment is subject to the following terms:

1. All matters that require financial commitments by the Assembly shall be – brought to the notice of the Tobago House of Assembly for agreement before any final commitments are made.

2. The Tobago House of Assembly or its appointed agents, shall be consistently notified of the developments in the loan processing and all related contingent conditions that may arise in due course of said process.

3. All schedules of payments and money management shall be determined and pursued only with the agreement of the Tobago House of Assembly.

4. Ms. Sorsby or an appropriately identified and appointed agent of CAN-AM must be available to the Tobago House of Assembly, or its appointed agents, at all times.

5. This agency will be revoked in writing if Ms. Sorsby has failed to perform.

6. This agency agreement will remain in effect for six months, with an option of renewal, subject to the Tobago House of Assembly's satisfaction with Ms. Laura-Lee Sorsby's performance and the continuance of its engagement with ongoing financing arranged by Can-Am International L.L.C.

The Tobago House of Assembly anticipates a productive relationship with CAN-AM International.

Yours,

/s/ Hochoy Charles
Honourable Hochoy Charles
Chief Secretary,
Tobago House of Assembly.

No. 06-6

FILED
JUL 3 1 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CAN-AM INTERNATIONAL, L.L.C.,

Petitioner,

v.

THE REPUBLIC OF TRINIDAD & TOBAGO and the TOBAGO HOUSE OF ASSEMBLY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Respondents, the Republic of Trinidad & Tobago and the Tobago House of Assembly, submit that the Questions Presented by Petitioner, Can-Am International, L.L.C., do not reflect accurately the issues in dispute in this litigation. Rather, Respondents submit the following questions as the proper issues for review:

Did Petitioner establish that Respondents waived their right to immunity under the waiver exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(1), by signing a "pay order," the validity and enforceability of which was conditioned upon the formation of a later, separate contract, which was never entered?

Did Petitioner establish that Respondents are subject to jurisdiction in the courts of the United States by demonstrating the applicability of the "commercial activity" exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2)?

If either the waiver or commercial activity exceptions to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1605(a)(1)-(2), apply to allow jurisdiction over Respondents, is summary judgment in favor of Respondents appropriate for other reasons?

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CITATIONS TO OFFICIAL AND UNOFFICIAL OPINIONS AND ORDERS ENTERED BELOW

The Decision granting summary judgment to Respondents by the United States District Court for the Southern District of Texas is unpublished but attached hereto at Respondents' Appendix A26-A35. The District Court's Order denying rehearing is unpublished but attached hereto at A38-A39. The March 1, 2006 Opinion of the United States Court of Appeals for the Fifth Circuit, affirming the District Court, is published at *Can-Am Intern., LLC v. Republic of Trinidad and Tobago*, 169 Fed. Appx. 396, is available on Westlaw® at 2006 WL 481663, and is attached hereto at A1-A25. The Fifth Circuit's Order denying rehearing is unpublished but attached hereto at A36-A37.

STATEMENT OF JURISDICTION

Generally, this Court has jurisdiction over appeals from the federal courts of appeals pursuant to 28 U.S.C. § 1254(1). However, the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, precludes the exercise of jurisdiction by this Court, or any other court in the United States, as Respondents are foreign sovereigns entitled to immunity from suit.

STATUTE AT ISSUE

The statute involved in this case is the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, the pertinent text of which is set forth at A40-A43.

I. STATEMENT OF THE CASE

A. Statement of the Proceedings Below

In November 2001, Can-Am International, L.L.C. ("Petitioner" or "Can-Am") filed a Complaint against Respondents, the Republic of Trinidad & Tobago ("T&T") and the Tobago House of Assembly (the "THA") (collectively, "Respondents"[1]) in the United States District Court for the

[1] Where necessary, Respondents are referred to individually. Petitioner never has alleged activity by T&T itself, but instead, only alleges that conduct of the THA or THA officials can be attributed to T&T. *See infra* section I.C.6. at 12; *see also generally* A149-A158.

Southern District of Texas, asserting claims for breach of contract, fraud, negligent misrepresentation and promissory estoppel (*see* Petition ("Pet.") at 1; *see also* A9), all purportedly based on a proposed transaction that never occurred. Respondents filed a motion to dismiss, or, alternatively, for summary judgment, based primarily on their immunity under the provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* (the "FSIA"). (A9.) The District Court denied the motion and allowed discovery (*Id.*) Subsequently, Petitioner amended its Complaint, adding a count for *quantum meruit*, over Respondents' objection. (*Id.*)

In April 2004, Respondents filed motions for summary judgment, based primarily on the FSIA. (A9.) They alternatively argued that summary judgment was appropriate as there was no genuine issue as to any material fact, and that Respondents were entitled to judgment as a matter of law on all counts of the Amended Complaint. (*Id.*)

On September 8, 2004, the District Court granted Respondents' motions for summary judgment, concluding that the FSIA precluded it from reaching the merits of the case, for the reason that "there is no basis to overcome [Respondents'] presumption of immunity." (A9.) Thereafter, Petitioner's motion for reconsideration was denied on November 23, 2004. (*Id.*)

Petitioner appealed to the Fifth Circuit, which, in an Opinion dated March 1, 2006 (the "Opinion," A1-A25), affirmed the District Court's grant of summary judgment in Respondents' favor, holding that Respondents were entitled to immunity under the FSIA and that neither the waiver nor commercial activity exceptions to the FSIA applied to defeat that immunity.[2] (A25.) Petitioner's subsequent motion for reconsideration was denied

[2] Neither the District Court nor the Fifth Circuit had occasion to decide Respondents' summary judgment motions on the merits because both courts dismissed Petitioner's case on subject matter jurisdiction grounds. Should this Court conclude that the FSIA does not provide Respondents with immunity, it is submitted, for the reasons set forth in section II.C., *infra* at 26, that summary judgment should have entered, in any event, for Respondents.

on March 30, 2006. (A36.) A petition for a writ of *certiorari* was docketed in this Court on July 3, 2006.

B. Statement of Facts[3]

The Petitioner asserts that it is "an American Company organized in the state of Texas," and that Laura Lee Sorsby ("Sorsby") is its founder and Chief Executive Officer. (Pet. at 1.)

T&T is a sovereign nation off the coast of Venezuela, consisting of the islands of Trinidad and Tobago. (A2.) The island of Tobago is administered by the THA, a political subdivision of T&T. (*Id.*) At all relevant times, Hochoy Charles was the Chief Secretary of the THA, and Allan Richards was the Chief Administrator of the THA. (*See id.*)

In the late 1990's, Sorsby began marketing her services as a "financial consultant" to the THA. (A2.) On February 5, 1999, she wrote to Chief Administrator Richards about a "creative financing structure" for raising money for public projects on Tobago, and proposed that she travel to Tobago to work to arrange this financing. (A3; A61.) Before arriving in Tobago, however, Sorsby asked Richards to 'appoint our company as your consultant/agent," assuring Richards that this appointment:

> does not commit the Government to anything . . . [y]ou do not have to pay us anything if the loan does not go though [sic]. . . . [i]f you decide you do not wish to take the loan and participate in the trading program, then the appointment becomes null and void.

(A3.)

On February 22, 1999, Chief Secretary Charles signed a letter appointing Sorsby as the THA's "financial consultant" for three development projects. (A3.) The letter of appointment

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[3] The Respondents cite to the facts set forth in the Opinion, portions of the record in the Fifth Circuit, portions of the record in the District Court, and portions of Petitioner's brief to the Fifth Circuit. (The Respondents treat the Petitioner's assertions, and those of its Chief Executive Officer, Laura Lee Sorsby as true solely for purposes of this Opposition.) The cited documents are included in the Appendix hereto.

did not obligate the THA to participate in any financing arrangement presented by Sorsby. (A137-A137.) Rather, the letter required Sorsby to bring all matters that required financial commitments by the THA to the THA "for agreement before any financial commitments are made," and stated that "all schedules of payments and money management shall be determined and pursued only with the agreement of the THA." (A136.) The appointment was for a six-month term, with a non-automatic option of renewal. (A136-A137.)

The THA did not pursue the financing program described in Sorsby's February 5th letter. (A6.) On March 18, 1999, Sorsby sent the Chief Administrator of the THA a letter recommending a different program, allegedly available through a London firm called the "Bower Cotton Group."[4] (A65-A67.)

Sorsby cited several reasons why she felt that investing with Bower Cotton was in the THA's "best interest": the funds invested by the THA would be deposited in a Swiss bank account; the THA's principal would never leave the bank account; "the payment" would be "guaranteed by the participating bank"; and "all transaction [sic] [would] be monitored by the federal reserve [sic]." (A65-A67.)

Nine days after this letter, the THA and Sorsby executed a Memorandum of Understanding ("MOU") pertaining to Sorsby's role as financial consultant and her fee for her services. (A4.) Like the letter of appointment, the MOU did not obligate the THA to participate in any financing program proposed by Sorsby. (A68-A78.) The MOU provided that "all schedules of payments and money management shall be determined and pursued only with the agreement of the [THA]." (A71.)

The fee clauses of the MOU provided, in relevant part, as follows:

> For the services of financial consultant, THA agrees to pay the Financial Consultant a fee equal to ten percent

---

[4] Although not apparent from her letter to the THA or from the Petition, Bower Cotton is a law firm, and not an investment house. (A111.)

> (10%) of all monies earned from the private placement (or other funding programs) out of funds provided to THA generated by the funding program arranged by the Financial Consultant. . . .
>
> In the event that the House selects a form of conventional financing from the financing structures submitted by the Financial Consultant, the parties shall negotiate prior to the closing of the conventional financing a fee agreeable to both parties to compensate the Financial Consultant for the services in arranging such financing. The fee to be payable upon closing.

(A5.)

In early April, 1999, Sorsby and THA officials traveled to London for a series of meetings where various individuals presented investment opportunities for the THA's consideration. (A6.) One of the meetings took place at Bower Cotton with a solicitor in that law firm, who has since prohibited from practicing law by the Law Society, and representatives of a company called Nikea, N.V. (A6; A159-A160.)

Three days after the meeting at Bower Cotton, on April 12, 1999, Sorsby wrote to Chief Secretary Charles with "wonderful and timely news for the THA." (A6.)[5] Sorsby reported that "Bower Cotton/Nikea" had an investor with "US $100 million of good clean funds" that Bower Cotton/Nikea's investor was placing into a trading program, *i.e.*, an investment program. (A6; A79.) Sorsby stated that the THA had an opportunity to "piggyback" $10 million of the THA's money onto the $100 million that Bower Cotton/Nikea was placing in the investment program. (A80.) Sorsby assured the Chief Secretary that the transaction was entirely risk-free to the THA: "[t]here is absolutely no risk for the THA because your US $10 million stays in your own account and in your own control with absolutely no leans [sic] against the monies." (A81.)

---

[5] The letter is mistakenly dated March 12, 1999. It should have been dated April 12, 1999. (A6 n.4.)

In its brief to the Fifth Circuit, Petitioner elaborated on the alleged opportunity with Bower Cotton/Nikea. Petitioner asserted that Sorsby had "secured a funding program with philanthropic interests." (A59.) The "philanthropic" funding group was allegedly willing to invest $100 million into an investment program to be managed by Peter Newton, on behalf of Nikea, N.V., provided that the THA invested $10 million. (A7; A59.)[6]

Petitioner claimed that the "combined funds, $110 million, would be placed in an investment program to be managed by Mr. Peter Newton." (A59.) According to Petitioner, the "program would leave $10 million at all times in an account that would be in the control of the THA only." (*Id.*) In addition, under this alleged program, the THA's principal would be guaranteed by: "a bank guarantee, for a period of a year . . . purchased from a top 25 bank guaranteeing the $10 million invested by the THA." (*Id.*)

According to Petitioner, "[a]fter 12 months, 30% of the profits generated would be disbursed to the THA to fund the projects, 30% would be [sic] go to the investors that pledged the $100 million, and the remainder would be reinvested into the trade for an additional 12 months." (A59.) (Apparently, the philanthropic funding group was willing to let the THA receive a disproportionate share of the profits.) Petitioner also stated

[6] In the Appendix to its Petition, Petitioner includes the unverified, unsworn affidavit of Mohammad Mohammadi, the alleged "philanthropic investor" whom Petitioner states that Sorsby introduced to Nikea, N.V. (*See* Petioner's Appendix ("Pet. App.") E.) The purported affidavit (allegedly signed in Switzerland) is inadmissible, because it is not subscribed by Mohammadi as true under the penalties of perjury of the United States of America, as required by 28 U.S.C. § 1746(1). Respondents moved to strike the affidavit on this and other grounds. Respondents also moved to strike portions of the Sorsby affidavit, which is also included in the Appendix to the Petition, including the portions in which she purported to explain the Bower Cotton program. The District Court did not reach either motion to strike, presumably because they were not material to the grounds on which the District Court granted summary judgment.

that "[t]he guarantee for the principle [sic] placed into the fund for the second year would be the same as the guarantee for the first year." (A59-A60.) Sorsby testified that the anticipated profits under the investment program that she recommended were "30% a month."[7] (A126.)

In her letter of April 12, 1999 describing the Bower Cotton proposal, Sorsby told the Chief Secretary that "in order to get your contract issued from the bank for your review and approval," the THA needed to sign three documents: (1) a "Letter of Intent," (2) "Proof of Funds," and (3) "Pay orders signed and notarized." (A7; A80.) Sorsby testified that a "pay order" is an order to pay a commission, in this case, to her. (A118-A119.) Concerning the pay orders, Sorsby assured the Chief Secretary, "[r]emember our pay orders are generated through the trade, so if you do not go forward with the contract, these pay orders will be worthless." (A7.) On April 30, 1999, Chief Secretary Charles signed the requested documents. (*Id.*)

The Letter of Intent states that the Chief Secretary is "willing and able to enter Ten Million US dollars for participation into a private bank-secured investment programme, subject to my [the

[7] Without compounding, an interest rate of 30% per month on $110 million of principal yields total interest of $396,000,000 after 12 months. Thirty percent of these profits would be $118,800,000 on an investment of $10 million. Therefore, apparently, the THA would have earned over $118 million in one year, or approximately 1180%, on its "guaranteed" initial $10 million investment. In the event of compounding, the total investment at the end of twelve months would be worth approximately $2 billion. As Respondents argued in the courts below, Petitioner's assertions concerning the Bower Cotton investment program must be disregarded, based on the fact that it lacks admissible evidence that Bower Cotton actually offered such a program, and based on the lack of record citations in support of most of its assertions about the alleged program. Even if the assertions are treated as true, however, they do not support Petitioner's claim that it is entitled to $10 million (10% of the $100 million that Sorsby allegedly secured from the philanthropic funding group) (A126-27), or any other sum. It is undisputed that the THA did not participate in the "recommended" funding program and did not receive any money from it. (A9.)

Chief Secretary's] approval of the contract." (A7.) The Letter of Exclusivity grants "the trade program manager/administrator/ facilitator [*i.e*, Peter Newton] full exclusive right as our sole agent . . . to enter these funds for me, or the corporation into the best available bank-secured investment program" (A8) and attests that the Chief Secretary has sent "cease and desist notices to any other intermediaries or trade groups that have had our paperwork in the past." (A147.)

The Irrevocable Payment Order Confirmation (the "Pay Order") provides that Sorsby will receive "a total of 10% (Ten Percent) of the net disbursable profits received by [the THA] or any Company on their behalf to facilitate the investment transaction. . . ." (A7–A8.) Regarding the bank account to which Sorsby's commission should be paid, the Pay Order states "[t]o be advised." (A142.) The Pay Order includes a waiver of immunity rights. (A8.) It also states that it "is valid upon commencement of the start of the transaction herein. . . ." (*Id.*)

Despite Sorsby's recommendation, the THA did not invest with Bower Cotton. As the Fifth Circuit stated, "[t]here was no investment transaction in relation to the Bower Cotton proposal," and "the THA never signed a contract with a bank in relation to such an investment." (A15.)

In an e-mail dated July 11, 1999, Sorsby stated to the THA's business analyst, Rennie Dumas, that she "cannot afford to keep giving away my services and educating these people. . . . the letter [Charles] prepared and the payorder meant nothing since [the THA] did not go forward." (A8; A98-A99.) In a letter to Chief Secretary Charles dated March 7, 2000, Sorsby expressed her frustration with the THA: "I have always tried to get you what you need, lawyers, funding etc. and have not ever charged you a dime." (A8; A104.) Sorsby asked Charles to meet with some financiers whom she knew, assuring him that "[t]his does not commit you to anything." (A104.) Thereafter, some THA officials met with some financiers introduced by Sorsby, but did not enter into any agreement with them. (A8-A9.) Respondents never obtained or received any money from any financing source introduced by Sorsby or Petitioner. (A9.)

C. Misstatements of Fact by Petitioner[8]

1. Sorsby's Experience with International Financing Arrangements

Petitioner asserts that "Ms. Sorsby has extensive experience with international financing arrangements." (Pet. at 1.) As purported support, Petitioner appends Sorsby's own self-serving affidavit, replete with hearsay, to which is attached a letter of recommendation from a Sermin Bahsis of Istanbul, Turkey, together with Sermin Bahsis' resume. (Pet. App. D14-D18.) Bahsis claims to have an MBA from the incredibly christened "Manchester School University of Whales (frozen)." (*Id.* at D16.) Respondents moved to strike these and other hearsay documents attached to Sorsby's affidavit. As noted above, the District Court did not reach the motion to strike, presumably because the material cited therein was irrelevant to the grounds on which the District Court granted summary judgment.

2. Petitioner's Misstatements about Respondents' Alleged Approval of a Contract for the Bower Cotton Proposal

Petitioner asserts that the documents signed by Chief Secretary Charles on April 30, 1999 "demonstrate" that "the Chief Secretary actually approved the contract in the Bower Cotton proposal under penalty of perjury." (Pet. at 6.) Similarly, Petitioner asserts that Chief Secretary Charles "accepted" the "funding" allegedly secured by Petitioner "when he issued a Letter of Exclusivity giving Peter Newton/Bower Cotton the exclusive right to enter the contract." (*Id.* at 6-7). Petitioner also asserts that:

> Mr. Newton preceded [sic] with the contract to enter the funds and probed the bank account at the instruction of the Chief Secretary and Secretary of Finance, Hochoy

---

[8] This section is included pursuant to the Court's "admonition" in Supreme Court Rule 15.2 regarding Respondent's obligation to point out any perceived misstatement in the petition. While Respondents take issue with most of the statements in the Petition, due to space constraints, Respondents highlight the most egregious of the misstatements.

> Charles, but the T&T Government did not have the funds that they pledged under penalty of perjury that they had, therefore causing a breach in the contract.

(*Id.* at 7.) For the reasons set forth below, and as the Fifth Circuit held, the documents signed by Hochoy Charles did not give Petitioner or Peter Newton authority to approve the Bower Cotton proposal on behalf of the THA.

3. Petitioner's Misstatements as to its Right to Compensation, and Where Sorsby Was to be Compensated

Petitioner asserts that it "was to receive a 10% commission as compensation for securing funding." (Pet. at 1; *see also id.* at 6). Petitioner asserts that "Ms. Sorsby secured funding for the T&T government through the Bower Cotton transaction and Mohammed [the alleged philanthropic investor] pledged to that transaction." (*Id.* at 6.) Petitioner asserts that "[u]ltimately, the Government reneged on the funding project leaving Can-Am uncompensated for years of efforts on behalf of the Government." (*Id.* at 1.) Petitioner claims that "Ms. Sorsby did everything she was requested to do," and that "[h]er performance was complete without complaint or criticism." (*Id.* at 7.) Petitioner also claims that Ms. Sorsby "was to be compensated for her work in the United States." (*Id.* at 13.)

In fact, since the THA was under no obligation to enter any funding program arranged by or "secured" by Petitioner, Petitioner's right to a fee was not contingent upon Petitioner's "securing funding." Rather, under the MOU, Petitioner would be entitled to a fee equal to ten percent of the "monies earned" by the THA on its investment only in the event that the THA actually entered an investment program arranged by Petitioner, and only if the THA actually received a return on its investment – neither of which happened. (A5; A9.)[9]

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[9] Solely for purposes of this opposition, without waiver of any argument or affirmative defense, Respondents treat the MOU as a valid contract. Had this case gone to trial, Respondents would have proven

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Furthermore, there is no record support for the statement that Sorsby was to be compensated, if at all, in the United States. In fact, regarding the bank to which payments to Sorsby were to be made, the Pay Order states, "[t]o be advised." (A142.)

4. Petitioner's Misstatements as to the Chronology and Location of Events Relating to the Bower Cotton Proposal

Petitioner states as follows:

> Allan Richard's [sic] wrote to Ms. Sorsby in the U.S. to set up meetings in Tobago for her to travel to Tobago with Hugh Hague from Canada, to complete the Bower Cotton proposal and travel on to London for a meeting with Bower Cotton all of which including, but not limited to, the irrevocable pay order and letter of exclusivity was negotiated and originated in the U.S. in the office of Can-Am [sic] attorney through telephone conferences, fax and e-mail, prior to traveling to Tobago and on [sic] London.

(Pet. at 11.)

Petitioner also states:

> The Fifth Circuit's narrow focus on the Bower Cotton transaction fails to recognize that the Bower Cotton transaction as well as many other funding proposals were negotiated and originated in the United States.

(*Id.* at 13.)

These statements are untrue. As the record demonstrates, Sorsby and THA officials traveled to London in early April, 1999, where they met with representatives of Bower Cotton and Nikea. (A6.) Three days after that meeting, on April 12,

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(Cont'd)

that it is not a valid contract, and that if it were a valid contract, neither Petitioner nor Sorsby performed. Respondents also note that Petitioner lacks any competent evidence that it or Sorsby "secured funding" for the THA. As discussed above, neither Sorsby's affidavit nor Mohammad Mohammadi's affidavit contains admissible statements in support of the assertion that Petitioner "secured funding." (*see* fn. 6&7, *supra* at 6-7.)

1999, in a letter announcing the "wonderful and timely news" of an investment opportunity with Bower Cotton, Sorsby informed Chief Secretary Charles that the THA needed to sign various documents, including "pay orders," in order to "get your contract issued from the bank." (A6-A7.) There is no record evidence that the irrevocable pay order, letter of exclusivity (addressed to Peter Newton in London), or any other document signed by any THA official was "negotiated" or "originated" in the United States. In addition, Sorsby stated that "Peter Newton said [the "bank"] was in Switzerland." (A113.)

Regarding "other funding proposals" which allegedly were "negotiated and originated in the United States," the record contains no competent evidence of any such proposal.

5. Petitioner's Misstatement Concerning Activity of the THA's Business Analyst

Petitioner states that "Ms. Sorsby and Rennie Dumas, the THA's business analyst, continued their work in the United States and Tobago on funding program proposals." (Pet. at 11.) There is no support in the record for the statement that Rennie Dumas worked in the United States on any funding program proposal.

6. Petitioner's Misstatements Concerning the Relationship between the Government of the Republic of Trinidad and Tobago and the THA, and the Role of the Chief Secretary of the THA

Petitioner refers to the THA as the "legislative body" of T&T and as the "governing body" of T&T. (Pet. at 1). In fact, "T&T . . . established the [THA] *to administer Tobago Island.*" (A2) (emphasis added.) The THA consists of an Executive Council, which comprises several Secretaries, including the Chief Secretary. (*Id.*) The responsibilities of the Chief Secretary include "planning Tobago Island development projects." (*Id.*) Petitioner describes Hochoy Charles, Chief Secretary of the THA, as the Chief Secretary of "T&T," and also describes him as the "highest government official in charge of Finance (akin to our U.S. Secretary of the Treasury)." (Pet. at 1.) There is no record support for either of these misstatements of fact.

7. Petitioner's Misstatements Regarding an "Agency" Relationship between the THA and Ms. Sorsby or Can-Am

Throughout the Petition, Petitioner refers to itself or Sorsby as the "agent" of T&T and/or the THA, based solely on an "express agency agreement." For the reasons set forth below, neither Petitioner nor Sorsby was an "agent" of either Respondent.

8. Petitioner's Misstatements Regarding the Waiver of Immunity Clause in the Pay Order

The Petition refers numerous times to Respondents' alleged "waiver" of their sovereign immunity, implying a general waiver of immunity by Respondents. Petitioner erroneously relies on one clause of the "Pay Order" – an agreement related only to the Bower Cotton proposal – to demonstrate such waiver. As set forth in greater detail below, however, the Pay Order's validity and enforceability was conditioned upon Respondents' approval of the Bower Cotton proposal, which never happened.

9. Petitioner's Misstatements Regarding Can-Am's Commercial Activities in the United States

There is no record support for the statement that Petitioner was engaged to "solicit sources in the United States for commercial financing originating in the United States . . . ." (Pet. at 13.) In fact, Petitioner itself refers to its alleged solicitation of financing and investment opportunities on behalf of the THA outside of the United States, including the Bower Cotton proposal. (*Id.* at 11.) In any event, as explained fully below, the conduct that Petitioner alleges took place in the United States is irrelevant because (1) Petitioner's actions cannot be imputed to Respondents, wherever those actions took place; (2) none of Petitioner's actions are the "basis" for its lawsuit; and (3) such actions did not rise to the level of "commercial activity."

II. REASONS FOR DENYING THE PETITION

The Fifth Circuit correctly affirmed the District Court's grant of summary judgment in Respondents' favor, properly determining that Petitioner's claims cannot be brought against

Respondents because they are immune from suit in the courts of the United States under the FSIA and neither the waiver nor commercial activity exceptions to the FSIA apply. No "compelling reasons" exist to grant *certiorari* in this case, as the Fifth Circuit's Opinion followed well-established interpretations of the FSIA by this Court[10] and the various Courts of Appeals.

The Petitioner does not make any attempt to present "compelling reasons" for its Petition to be granted – nor could it. *See* Sup. Ct. R. 10. Petitioner does not argue that the Opinion is in conflict with a decision of this Court or another Court of Appeals, that the Fifth Circuit decided an important federal question that has not been settled by this Court, or that the Fifth Circuit has decided an important federal question in a way that conflicts with the relevant decisions of this Court.[11] *See* Sup. Ct. R. 10(a)-(c).

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[10] This Court alone has decided 17 cases interpreting the FSIA since its enactment. *Fernandez-Vargas v. Gonzales*, 126 S.Ct. 2422 (June 22, 2006); *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 126 S.Ct. 1193 (Feb. 21, 2006); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 523 U.S. 751 (1998); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Mesa v. California*, 489 U.S. 121 (1989); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978). None of these cases provide any support for Petitioner's argument that the waiver and commercial activity exceptions to the FSIA apply here.

[11] For example, Petitioner's argument that "no other Circuit Court or any U.S. Supreme Court cases hold that an express waiver of immunity

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Furthermore, Petitioner does not state that the Fifth Circuit inaccurately stated the law or inaccurately described the summary judgment record. Rather, Petitioner merely claims that the Fifth Circuit misapplied "a properly stated rule of law" to the undisputed evidence or that the Opinion contained "erroneous factual findings" *See* Sup. Ct. R. 10. Rule 10 expressly instructs that a petition for *certiorari* is "rarely granted" on these grounds. *Id.*

Because none of the arguments of Petitioner, nor any of the cases cited in the Petition,[12] provides any "compelling reason" to grant the Petition, it should be denied.

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clause has been obliterated because the contract was deemed conditional" (Pet. at 5) is not a "compelling reason" for granting a writ of *certiorari* because it does not argue that the Fifth Circuit's decision is in conflict with a decision of this Court or another Court of Appeals, that the Fifth Circuit decided an important federal question that has not been settled by this Court, that the Fifth Circuit has decided an important federal question in a way that conflicts with the relevant decisions of the Supreme Court, or that the Fifth Circuit inaccurately stated the law or inaccurately described the summary judgment record. *See* Sup. Ct. R. 10(a)-(c). Petitioner's argument is rendered even weaker by its inability to cite any cases, anywhere in the Petition, in its favor — *i.e.*, holding that an express waiver of immunity can be enforced where it is expressly contingent on the formation of a contract that was never formed.

[12] Indeed, the four cases cited by Petitioner as "recent[] . . . interpretation[s]" by this Court of the FSIA (Pet. at 4) (*Elahi*, 126 S.Ct. 1193; *Exxon Mobil*, 544 U.S. 280; *Altmann*, 541 U.S. 677; and *Dole*, 538 U.S. 468) provide no support for Petitioner's argument and, indeed, have no relevance to this case whatsoever. In *Elahi*, this Court discussed the question of whether Iran's Ministry of Defense was an "agency or instrumentality" of Iran, for purposes of analyzing whether the Defense Ministry's property in the United States was subject to attachment, and remanded to the Ninth Circuit for further consideration. 126 S.Ct. at 1194-95. The *Exxon Mobil* case deals with the FSIA tangentially, mentioning it only in its description of the proceedings below, and does not interpret the FSIA or apply its principles. 544 U.S. at 290-91. *Altmann*
(Cont'd)

A. The Fifth Circuit Court of Appeals Properly Held that the Waiver Exception to the FSIA Does Not Apply

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in a court in the United States." (A10) (citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989)). "Under the [FSIA], a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *see* A10. Here, both Respondents meet the definition of "foreign state" set forth in 28 U.S.C. § 1603(a) as "it is undisputed that T&T is a foreign state and that the THA is T&T's instrumentality." (A11.) Thus, Respondents have established a *prima facie* case for immunity under the FSIA and it was incumbent upon Petitioner to rebut that and demonstrate that one of the exceptions to the FSIA applies. (A11) (citing *United States v. Moats*, 961 F.2d 1198, 1205 (5th Cir. 1992)).

The only relevant exceptions to the FSIA that would allow a federal court to exercise jurisdiction over Respondents are the "waiver" and "commercial activity" exceptions to the FSIA. 28 U.S.C. § 1605(a)(1)-(2); *see* Pet. at 3-4. The Fifth Circuit properly held that Petitioner failed to satisfy its burden to establish that the "conduct that forms the basis of [its] complaint" falls within one of these exceptions. (A11) (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610-11 (1992); *see also* A25.

The waiver exception to the FSIA applies only when the foreign state "has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver

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held that the FSIA applies to claims involving conduct that occurred prior to the enactment of the FSIA. 541 U.S. at 699-700. Finally, *Dole* held that only where a foreign state owns a majority of shares of a corporation can that corporation be considered to be an "instrumentality of a foreign state" under the FSIA. 538 U.S. at 480. The remainder of the cases cited in the Petition are distinguished herein.

which the foreign state may purport to effect, except in accordance with the terms of the waiver." (A12) (quoting 28 U.S.C. § 1605(a)(1)). The Fifth Circuit, pointing out that the waiver exception is to be "narrowly construed" (A12) (quoting *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 482 (5th Cir. 1998)), correctly held that, in this case, the waiver exception to the FSIA does not apply. (A15.)

The only basis that Petitioner asserts in support of its argument that Respondents waived their sovereign immunity is a clause in the "Pay Order" for the Bower Cotton proposal (Pet. at 6), which never came to fruition. The Fifth Circuit appropriately rejected this argument, holding that, "[n]either T&T nor the THA waived sovereign immunity with respect to the conduct upon which Can-Am's complaint stands, because the document containing the waiver clause was conditional, and the condition never occurred." (A12.)

In reaching this conclusion, the Fifth Circuit properly evaluated the "Pay Order" within the context of its execution. Simultaneously with its signing, Chief Secretary Charles signed the "Letter of Intent" and the "Letter of Exclusivity," both of which explicitly reference the Bower Cotton proposal. (A7.) Sorsby requested the execution of these documents together, writing to Chief Secretary Charles "[w]e must have these things in order to get your *contract issued from the bank for your review and approval*." (*Id.*) (emphasis added.)

The "Pay Order" states that it is "*valid upon commencement of the start of the transaction herein.*" (A8) (emphasis added.) Further, the Pay Order states that it "will be executed, following settlement and clearance of funds into the Disbursement Account for the first and subsequent tranches." (A140.) By its own terms, therefore – as the Fifth Circuit properly determined – the "Pay Order" is a *conditional* agreement to pay Sorsby a commission – or, as the Fifth Circuit put it, a "contingency fee" – on profits generated by an investment. (A15.) The Pay Order simply could not be "breached," as Petitioner mistakenly alleges, because any obligation of the THA to pay Sorsby rose or fell, in the first

instance, with entry by the THA into a "specific investment transaction" with Bower Cotton – a transaction separate and apart from the mere execution of the Pay Order and related documents.[13] *Id.* The Pay Order, therefore, was rendered meaningless when the THA decided against investing in the Bower Cotton proposal. *Id.*

Petitioner's convoluted argument that the Bower Cotton proposal was "approved" by the Letter of Exclusivity (Pet. at 6-7) should be ignored – as it was by the Fifth Circuit – as being without foundation in fact or logic. (A13-A15.) The Letter of Exclusivity does not state that the THA funded or otherwise entered into any investment and is irrelevant to the waiver issue, as demonstrated by the Fifth Circuit's sound rejection of that argument. (*Id.*) Rather, the Letter of Exclusivity afforded Peter Newton the exclusive right for twenty days to enter the THA's funds into "the best available investment program" (A7), but the decision as to which program was "best available" was the THA's to make. Petitioner offered no evidence that the THA ever signed a contract with a bank in relation to any investment program with Bower Cotton or any funding group presented by Petitioner. (A9.)

The Letter of Intent, similarly, makes clear that the THA's participation in the alleged investment program was "subject to [the Chief Secretary's] approval of the contract." (A7.) Thus, Petitioner's argument that "[n]othing in . . . the . . . transaction documents in question suggests the express waiver was conditional" (Pet. at 6) ignores the Letter of Intent – a document signed simultaneously with the "Pay Order" and which references, like the Pay Order, the Bower Cotton proposal. (A7.) The Fifth Circuit astutely recognized this:

> The payment authorized by the order is conditioned on the investment transaction, which in turn relied on the THA's approval of and signature on a contract between it and the bank. There was no investment transaction in

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[13] Even Sorsby told the Chief Secretary, "our pay orders are generated through the trade . . . if you do not go forward with the contract, these pay orders will be worthless." (A7.)

> relation to the Bower Cotton proposal. Sorsby's contingency fee depended on profits generated by an investment that was never made; the THA never signed a contract with a bank in relation to such an investment. The waiver clause exists within a document that specifically relates to an investment transaction which never transpired. Thus, the waiver of "all rights of immunity" also relates to the investment transaction which never transpired.

(A15.)

The terms of the MOU – which did not obligate the THA to participate in any financing program, to pay anything to Sorsby if the THA did not earn profits from any such financing program, or to enter a conventional financing arrangement under a proposal presented by Sorsby – support the Fifth Circuit's interpretation.[14] As do Sorsby's own statements. On July 11, 1999, she wrote an e-mail to the THA stating "I cannot afford to keep giving away my services. . . . the letter [the THA] prepared and *the payorder [sic] meant nothing since the THA did not go forward [with the Bower Cotton proposal].*" (A8) (emphasis added.)

Thus, Petitioner's references to Respondents' "breach of contract" are utterly nonsensical. This case does not present the question that Petitioner says it does – whether a sovereign nation can avoid a waiver of immunity by breaching the agreement containing the waiver. Rather, in this case, the THA – for good reason[15] – never entered into the contract of which the immunity

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[14] In relevant part, the fee clause of the MOU provides as follows:

> [f]or the services of financial consultant, THA agrees to pay the Financial Consultant a fee equal to ten percent (10%) of *all monies earned from the private placement* (or other funding programs) *out of funds provided to THA generated by the funding program* arranged by [Sorsby].

(A5) (emphasis added.)

[15] *See* fn. 7, *supra* at 7, concerning Petitioner's promised rates of return on the Bower Cotton proposal. These rates of return were clearly unrealistic.

waiver was one component part. (A9; A15.) The Pay Order – and its waiver provision – never became effective as the THA decided not to enter into an investment scheme with Petitioner. The Fifth Circuit correctly held that the waiver exception to the FSIA does not apply.

B. The Fifth Circuit Court of Appeals Properly Held that the Commercial Activity Exception to the FSIA Does Not Apply

The Fifth Circuit also correctly held that the commercial activity exception to the FSIA does not apply in this case. A foreign sovereign's "commercial activity" must have a jurisdictional nexus with the United States for the exception to apply. The FSIA provides for three means of establishing that nexus: demonstrating the existence of (1) "a commercial activity carried on in the United States by the foreign state"; (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or (3) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere [that] causes a direct effect in the United States." (A17) (quoting 28 U.S.C. § 1605(a)(2)).

Further, the FSIA requires that, even if the "commercial activity" has the requisite jurisdictional nexus with the United States, for the exception to apply, a plaintiff's cause of action must be "based upon" that activity. (A18) (citing *NYSA-ILA Pension Trust Fund v. Garuda Indonesia*, 7 F.3d 35, 38 (2d Cir. 1993) ("[i]n construing the commercial activity exception, courts have required that a significant nexus exist between the commercial activity . . . and a plaintiff's cause of action"); *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana S.C.*, 923 F.2d 380, 386-87 (5th Cir. 1991) ("[n]ot only must there be a jurisdictional nexus between the United States and the commercial acts of the foreign sovereign, there must be a connection between the plaintiff's cause of action and the commercial acts of the foreign sovereign")); *see also de Sanchez v. Banco Central De*

Nicaragua, 770 F.2d 1385, 1391 (5th Cir. 1985) ("[t]he focus of the [commercial activity] exception to immunity . . . is not on whether the defendant generally engages in a commercial enterprise or activity . . . rather, it is on whether the particular conduct giving rise to the claim in question constitutes or is in connection with commercial activity. . . .")).

The Fifth Circuit correctly held that no "commercial activity" of Respondents had the requisite "jurisdictional nexus" with the United States under any prong of the exception. (A15.) The Fifth Circuit further held that, in any event, Petitioner's complaint was not based upon any commercial activity of Respondents. (A22.)

The Fifth Circuit explained that, under the commercial activity exception, a cause of action is "based upon" actions with a jurisdictional nexus to the United States where, if those actions are proven, they "would entitle a plaintiff to relief under his theory of the case." (A18) (citing *Nelson*, 507 U.S. at 357-58); *see also Stena*, 923 F.2d at 387 ("[t]he requirement . . . of a connection between the plaintiff's cause of action and the commercial acts of the foreign sovereign is a significant barrier to the exercise of subject matter jurisdiction in the United States courts.")

Analyzing the first two prongs of the commercial activity exception – "commercial activity carried on in the United States by the foreign state" and "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere" – the Fifth Circuit held that Respondents conducted *no* activity in the United States having the requisite contact with the United States and no "commercial activity" anywhere (A21-A22, n.10).

Further, the Fifth Circuit rejected Petitioner's argument that activity in the United States of Petitioner, as the agent of Respondents, could be imputed to Respondents.[16] (A19) ("the

[16] The agency argument was not properly before the Fifth Circuit as it went entirely unmentioned in the District Court. When Petitioner first raised the agency argument in its brief to the Fifth Circuit, it was (Cont'd)

commercial acts must be of the named Defendant"). The Fifth Circuit held that Petitioner "did not substantiate its theory" that it was an agent of Respondents.[17] (A19.) Crucial to the Fifth Circuit's analysis were its findings that the record did not support Petitioner's claim that Respondents had "both the right to assign Sorsby's task and control the means and details of the process by which she would accomplish it."[18] (A20.) Petitioner claims

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largely incomprehensible. To the extent that the agency argument is reviewed, it can only be seen as backwards and should be ignored. Ironically, if Sorsby could demonstrate that she was an "agent" of T&T or the THA, she might argue for protection under the FSIA in the event that some third party filed suit against her for any actions taken on behalf of Respondents. *See, e.g., Velasco v. Government of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004) ("courts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state"); *Bryks v. Canadian Broad. Corp.*, 906 F. Supp. 204, 210 (S.D.N.Y. 1995) (immunity extends to agents of a foreign state acting in their official capacities). However, Petitioner has cited no authority for the proposition that, under the FSIA, a plaintiff can look to its *own* actions, as a purported agent for a foreign sovereign, to establish that the commercial activity exception applies.

[17] Petitioner's arbitrary declaration that the Fifth Circuit's decision regarding "the commercial character of *Can-Am's actions*" is in contradiction with *Weltover*, 504 U.S. 607 (Pet. at 5) (emphasis added) is, at best, simply uninformed and, at worst, a desperate, baseless attempt to conjure a "compelling reason" for granting *certiorari*. As observed by the Fifth Circuit, this Court's *Weltover* decision did not face any question regarding agency and evaluated, under the commercial activity exception to the FSIA, only the acts of the foreign sovereign. *Weltover*, 504 U.S. at 609-10; *see also* A20 ("*Weltover* does not conclude that the acts of the plaintiff within the United States may be attributed to the defendant to defeat sovereign immunity. . . . [r]ather, it is the acts of the foreign government that determine if the foreign sovereign's acts are 'commercial' within the meaning of the FSIA").

[18] Furthermore, the MOU (executed after the "agency agreement") specifically restricted Sorsby's authority to bind Respondents. *See* A71 ("[a]ll matters that require financial commitments by the THA shall be brought to the notice of the THA for agreement before any final commitments are made.").

that the Fifth Circuit ignored the "express agency agreement" between it and the THA.[19] (Pet. at 9.) However, the Fifth Circuit clearly *rejected* any import of the agreement, appropriately elevating substance over form by holding that Respondents had no control over Petitioner – an element essential to a finding of agency (A20) – and summarily denying Petitioner's Petition for Rehearing on the issue. (A36-A37; A44-A57.)

In any event, the remainder of the Opinion clarifies that the Fifth Circuit's decision to reject application of the commercial activity exception did not hinge on its finding regarding agency.[20]

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[19] In addition to Petitioner's agency theory, it makes a desperate attempt to point to some connection between Respondents and the United States by alleging that Respondents engaged in commercial activity in the United States by contacting Sorsby, by letter and telephone, while she was in the United States. (Pet. at 11-12.) These facts, even if true, do not constitute "commercial activity" by Respondents upon which Petitioner's suit is based. *See, e.g., Stena*, 923 F.2d at 387 ("the connection between the cause of action and the sovereign's commercial acts in the United States must be material . . . . [i]solated or unrelated commercial actions of a foreign sovereign in the United States are insufficient to support a commercial activities exception to sovereign immunity"). In addition, Petitioner alleges that Rennie Dumas, a THA employee, and "government representatives" worked together "in the United States." (Pet. at 11-12.) Petitioner cannot cite the record for such propositions because they simply are not true and never happened. Nothing in the record, not even Sorsby's self-serving, inadmissible affidavit, contradicts the facts that meetings between Petitioner and Respondents occurred in either Trinidad & Tobago or London, all documents relevant to the relationship between Petitioner and Respondents were signed in Tobago, and Respondents never traveled to the United States in connection with any relationship with Petitioner. *See generally* A138-A148.

[20] Indeed, the Fifth Circuit noted that "there is a question as to whether Sorsby's acts in the United States qualify as 'commercial activities' . . . [because] [t]here are no cases to support the notion that investigating potential investment options constitute [sic] commercial activity under the FSIA." (A22.) Petitioner criticizes the Fifth Circuit and attempts to simplify this analysis, arguing that so long as the (Cont'd)

The Fifth Circuit held that even the alleged acts of *Petitioner* did not have the requisite nexus – or, as the Fifth Circuit termed it, "material connection" – with Petitioner's cause of action. (A22); *see also General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1383-84 (8th Cir.1993) (single meeting between parties in United States, along with use of mails, wire, and telephones not sufficient nexus); *Morgan Equip. Co. v. Novokrivorogsky State Ore Mining and Processing Enter.*, 57 F. Supp. 2d 863, 870-71 (N.D. Cal. 1998) (some negotiation, in the United States, of a contract between foreign sovereign and a United States company did not have a sufficient nexus with plaintiff's cause of action for breach of contract). The Fifth Circuit reasoned that it would be illogical for Petitioner to claim that its conduct had a "material connection" to its cause of action, because Petitioner insisted that it "met its end of the bargain." (A22.) If Petitioner did nothing wrong, the Fifth Circuit implicitly reasoned, and Petitioner was the only party conducting "commercial activity" with a jurisdictional nexus to the United States, then its suit could not be "based on" its own activity in the United States. (*Id.*)

Indeed, the only conduct of Respondents set forth in the Petition as causing harm to Petitioner is Respondents' "reneging" on funding the Bower Cotton proposal. (Pet. at 1.) But, the

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Respondents acted as "private player[s] in the market," they conducted "commercial activity." (Pet. at 10-11) (citing *Rush-Presbyterian-St. Lukes Med. Ctr. v. Hellenic Republic*, 877 F.2d 574 (7th Cir. 1989) and *Weltover*, 504 U.S. at 616). However, Petitioner has cited no cases supporting the proposition that merely investigating potential investment options constitutes commercial activity under the FSIA. In fact, the case law cited by Petitioner holds to the contrary. In *Weltover*, the defendant actually *issued* debt instruments, in stark contrast to the facts of this case, where Respondents entered into *no* transaction. Similarly, in *Rush-Presbyterian*, the Greek government entered into a contract with a Chicago hospital for the provision of kidney transplants to Greek nationals, part of which the defendant failed to pay. 877 F.2d at 575. Here, there was no such "transaction" – and thus, there was no commercial activity.

Petition does not allege that any acts undertaken by Petitioner, T&T or the THA in the United States have a "significant nexus" with that allegation.[21] *See also Nelson*, 507 U.S. at 357-58 (plaintiff's suit, alleging personal injury in the form of unlawful detention and torture by Saudi Arabia, was not "based upon" Saudi Arabia's acts of recruiting, and employing, United States citizen to work in Saudi Arabia, reasoning that "while these activities led to the conduct that eventually injured [the plaintiff], they are not the basis for the [plaintiff's] suit"); *Kelly v. Syria Shell Petroleum Dev.*, 213 F.3d 841, 852-53 (5th Cir. 2000) (negligence claim was not "based upon" safety duties contained in contract for the purchase of goods in the United States); *Gerding v. Republic of France*, 943 F.2d 521, 527 (4th Cir. 1991) (plaintiff's suit, alleging deeedent's wrongful death at sea while on a mission to repair underwater telephone line in Spain, was not "based upon" a meeting in the U.S. to discuss strategy for repairing line); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988) (plaintiff's breach of contract claim could not be "based upon" recruiting call that eventually led to contract, as call was merely a precursor to commercial transaction, noting that the "based upon" requirement of the commercial activity exception is "stricter than . . . a minimum contacts due process inquiry").

Finally, the Fifth Circuit appropriately rejected Petitioner's claim under the third prong of the commercial activity exception, holding that Petitioner failed to demonstrate commercial activity by Respondents that caused a "direct effect" in the United States. (A24-A25.) The Petition's only alleged "effect" in the United States is alleged injury to Sorsby based upon the decision of the THA not to enter into any financial transaction proposed by Sorsby. (A23; Pet. at 13.) The Fifth Circuit rejected this argument, reasoning that Respondents did not engage in "commercial activity" because they never "transferred money

[21] As set forth above at section I.C.4. at 11-12, Petitioner's claims that documents associated with the Bower Cotton proposal originated and were negotiated in the United States are entirely unsupported by the record.

in connection with any alleged investment opportunity identified by Can-Am." (A24.) The Fifth Circuit properly distinguished *Weltover*, 504 U.S. at 618, and *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 896 (5th Cir. 1998), reasoning that in both of those cases, the defendants agreed to pay funds into United States bank accounts and then failed to do so. (A23-A24 n.11.) In this case, Respondents never entered into any transaction with Petitioner and no money was due and owing to Petitioner.

Accordingly, the Fifth Circuit properly rejected all three prongs of the commercial activity exception to the FSIA.

C. If an Exception to the FSIA Applies Here, Summary Judgment in Favor of Respondents is Appropriate on the Merits

A further reason that the Court should deny the Petition is that, even if the Court decides that an exception to the FSIA applies subjecting Respondents to suit in the United States, Respondents have established that they are entitled to judgment on the merits.[22] *Eastman Kodak Co. v. Image Technical Svcs., Inc.*, 504 U.S. 451, 465 n.10 (1992) (Supreme Court has the power to review summary judgment decisions "by examining the record *de novo* without relying on the lower courts' understanding"); Fed. R. Civ. P. 56(c).

1. Petitioner Cannot Prove That Respondents Breached Any Contract

Under Texas law,[23] a claim for breach of contract requires proof of: (1) a valid contract; (2) plaintiff's performance or tender of performance; (3) a defendant's breach; and (4) a plaintiff's damages caused by the breach. *Guzman v. Ugly*

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[22] The Amended Complaint alleges breach of contract, fraud and fraudulent inducement, negligent misrepresentation, promissory estoppel, and *quantum meruit*. (A149-A158.) The THA and T&T are separate entities and Petitioner must prove each element of each claim against each defendant.

[23] For the most part, the laws of Texas and T&T do not differ. *But see* II.C.2., *infra* at 27 n.25.

Duckling Car Sales of Texas, 63 S.W.3d 522, 528 (Tex. App. 2001). Petitioner's breach of contract claim fails because there was no "contract" between Petitioner and the THA; no breach of any alleged contract; and Petitioner has suffered no damages as a result of any alleged breach.

To the extent that the Complaint alleges a breach of the MOU, the undisputed facts establish that the THA fulfilled all possible obligations under the MOU, which states expressly that Petitioner was not entitled to any fee unless the THA decided to invest its money and profits followed.[24] (A34, District Court opinion) ("[c]onsidering that [THA] was never bound to accept any proposal, the fact that Sorsby did not make money on *her* investment is not a legitimate basis for a breach of contract claim.") (emphasis in original.)

Further, Petitioner has no damages. No amount of tortured logic can explain how ten percent of nothing (the sum of all the profits received by the THA generated by investment opportunities Petitioner brought to its attention) equals $10 million, which Petitioner seeks. (Pet. at 1; A127.)

2. Petitioner Cannot Prove That Respondents Perpetrated Any Fraud Nor Fraudulently Induced Petitioner

To prove fraud or fraudulent inducement under Texas law,[25] there must be: (1) a material representation; (2) which was false;

[24] Nor do the "agency agreement", Pay Order, Letter of Exclusivity or Letter of Intent impose any obligations on the THA that have been breached. The agency agreement merely states that the THA "proposes to secure financing" and that there are projects "being considered for financing" and does not impose any obligation to invest in a proposal suggested by Petitioner. (A135-A137.) The Pay Order is conditional upon a later investment contract. (*See supra* at 17-20.) The Letter of Intent imposes no obligations and states only that the THA "is ready" for investment opportunities. (A143.) The Letter of Exclusivity imposes no obligation on the THA beyond a commitment to invest with a particular entity *if* it invests at all. (A13-A15.)

[25] There is no civil claim for fraudulent inducement under the laws of T&T. (A169.) Thus, to the extent T&T law applies, this claim would have to be dismissed.

(3) which was either known to be false when made or made recklessly without knowledge of its truth; (4) which was intended to be acted or relied upon; (5) which was relied upon; and (6) which caused injury or damage. *Formosa Plastics v. Presidio Engineers*, 960 S.W.2d 41, 47 (Tex. 1998). A promise of future performance is not actionable as a basis for a claim of fraud in the inducement unless made with the intent to deceive with no intention of performance. *Clardy Mfg. Co. v. Marine Midland Bus. Loans, Inc.*, 88 F.3d 347, 359-60 (5th Cir. 1996).

In its Amended Complaint, Petitioner points only to one allegation – that "THA and T&T represented to Can-Am that it intended to provide $10 million in funding for the requested financing structure arranged for by Can-Am and it intended to proceed with the capital improvement projects with the participation of Can-Am." (A152-A153.) This alleged fraudulent representation is not set forth with particularity — it is devoid of any detail regarding the source of the $10 million, the particular financing structure, or the projects to be pursued. Further, it is not false but merely an indication that, should the appropriate circumstances exist, the THA will consider taking certain action. Moreover, the representation is not material. The documents themselves are replete with language indicating that the THA had the right to approve any investment. Furthermore, Petitioner fails to state with particularity that it relied on any misrepresentation by Respondents to its detriment. Rather, Petitioner *knew* that it would not be paid unless the THA chose to invest in one of these programs and earned profits as a result. (A3; A5; A7-A8.)

3. Petitioner Cannot Prove that T&T or the THA Made Negligent Representations To Petitioner

To demonstrate liability for negligent misrepresentations, a plaintiff must show: (1) a false representation; (2) the failure to exercise reasonable care in making the representation; and (3) damages suffered as a result of reasonable reliance on the representation. *Griffin v. GK Intelligent Sys.*, 87 F. Supp. 2d 684, 690 (S.D. Tex. 1999). "[N]egligent misrepresentation does not occur when a defendant simply makes a guess as to a future,

unknown event." *Sergeant Oil & Gas Co. v. Nat'l. Maint. & Repair, Inc.*, 861 F. Supp. 1351, 1360 (S.D. Tex. 1994).

Petitioner has failed to identify *any* alleged negligent misrepresentations other than the same vague allegation used for its fraud claim. As discussed above, that representation was not false. The record contains no evidence that the THA and/or T&T could not, as opposed to chose not to, invest $10 million or could not proceed with capital improvement projects.

4. Petitioner Cannot Prove That It Was Estopped From Any Conduct On Account Of Any Actions Of T&T Or The THA

Promissory estoppel requires a showing of: (1) a promise; (2) foreseeability of reliance thereon by the promisor; (3) substantial reliance by the promisee to his detriment; and (4) a definite finding that injustice can be avoided only by the enforcement of the promise. *Zenor v. El Paso Health Care Sys.*, 176 F.3d 847, 864 (5th Cir. 1999). Petitioner cannot demonstrate reliance on any promise of Respondents to Petitioner's detriment. For example, Petitioner has not demonstrated that its alleged efforts are any different from those allegedly undertaken by it pursuant to the MOU, which did not obligate the THA to participate in any investment opportunities that Petitioner presented. (A71.) Further, as discussed above, Petitioner has not suffered any damages, as it assumed the risk that it would not be paid unless the THA earned profits from investments it entered. (A3; A5; A7-A8.)

5. Petitioner Cannot Prove It Has Any Basis For Recovery In *Quantum Meruit* Against T&T Or The THA

To recover under *quantum meruit*, a claimant must prove that:

> (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) which services and materials were accepted by the person sought to be charged, used, and enjoyed by him; (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in

> performing such services was expecting to be paid by the person sought to be charged.

Vortt Exploration Co. v. Chevron U.S.A., Inc., 787 S.W.2d 942, 944 (Tex. 1990).

Here, Petitioner, through the MOU, agreed that it would be paid 10% of all the profits earned by THA (A5) – a classic contingent fee agreement. That agreement cannot be circumvented with a *quantum meruit* claim. *Clary v. Schmolke*, 977 S.W.2d 883, 886 (Tex. App. 1998) (plaintiff in contingent fee agreement could not recover for value of services under *quantum meruit* as a matter of law). Further, Petitioner conferred no benefit upon Respondents. Moreover, Petitioner never put Respondents on notice that it expected to be paid for the services it rendered. To the contrary, in an e-mail message to the THA sent long after the THA rejected the Bower Cotton proposal, Sorsby wrote that she could "not afford to keep giving away my services and educating these people." (A8) ("I have always tried to get you what you need, lawyers, funding etc. and have not ever charged you a dime.") Finally, there is no evidence in the record of any costs or expenses allegedly incurred in the course of Petitioner's alleged work for the THA.

CONCLUSION

Petitioner has not established any compelling reasons to grant the Petition. For the foregoing reasons, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED MARCH 1, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-20007

CAN-AM INTERNATIONAL, LLC,

Plaintiff - Appellant,

v.

THE REPUBLIC OF TRINIDAD AND TOBAGO; THE TOBAGO HOUSE OF ASSEMBLY,

Defendants - Appellees.

Appeal from the United States District Court for the Southern District of Texas, Houston Division

Before GARWOOD, CLEMENT, AND PRADO, Circuit Judges.

EDWARD C. PRADO, Circuit Judge: *

Can-Am International, L.L.C. ("Can-Am") appeals the district court's entry of final judgment dismissing its action for lack of subject matter jurisdiction. The district court found that no exception to sovereign immunity applies under the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix A

Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, to support jurisdiction over Appellees.

I

Appellant Can-Am International, L.L.C. is registered in Texas. Laura Lee Sorsby is its founder and CEO. Appellees are the Republic of Trinidad and Tobago and one of its political bodies, the Tobago House Assembly.

The Republic of Trinidad and Tobago ("T&T") comprises two islands in the Caribbean Sea near Venezuela. After achieving independence from Great Britain in 1962, the T&T central government established the Tobago House of Assembly ("THA") to administer Tobago Island. The THA consists of an Executive Council, which comprises several Secretaries, including the Chief Secretary. The responsibilities of the Office of Chief Secretary include planning Tobago Island development projects. At all relevant times in this case, the House Chief Administrator or Chief Secretary was either Allan Richards or Hochoy Charles.[1]

In 1997, Sorsby marketed her services as a financial consultant to T&T and the THA. After learning that the THA needed financing for various development projects, Sorsby incorporated Can-Am International, L.L.C. ("Can-Am") in Texas in 1998 and began submitting finance proposals to the THA.

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1. The titles of these individuals and the dates in which they held these titles are not clear from the parties' briefs, but (like the district court noted in its order) these details do not affect the court's disposition.

Appendix A

Can-Am asserts that it sought funding proposals for conventional financing to be backed by a government guarantee in early 1998. Later, in November 1998, it sought funding proposals for conventional financing to be collateralized by THA assets. On February 5, 1999, Sorsby sent a letter to Richards outlining a financing program Sorsby had arranged through a large United States insurance company. In that letter she wrote:

> We are willing to come back to Tobago and work with you in order to try and put this whole thing together. But before we come, we would appreciate it if you could appoint our company as your consultant/agent. This does not commit the Government to anything. You do not have to pay us anything if the loan does not go though [sic]. If you decide you do not wish to take the loan and participate in the trading program, then the appointment becomes null and void.

On February 22, 1999, the THA appointed Sorsby, CEO of Can-Am International, L.L.C., as the financial consultant for three of its development projects. Paragraphs 5 and 6 of the appointment letter read:

> 5. This agency will be revoked in writing if Ms. Sorsby has failed to perform.
>
> 6. This agency agreement will remain in effect for six months, with an option of renewal, subject to the Tobago House of Assembly's satisfaction with Ms. Laura-Lee [sic] Sorsby's performance

and the continuance of its engagement with ongoing financing arranged by Can-Am International L.L.C.

Charles allocated THA office space to Sorsby along with this appointment.

On March 27, 1999, the parties formalized their relationship by outlining their respective responsibilities in a Memorandum of Understanding ("MOU").[2] Sorsby's responsibilities included: introducing different financing structures to the THA for government review and selection; arranging the funding institution subject to THA approval; providing contractual arrangements with program managers of trading groups acceptable to the THA; negotiating interest rates, if required, payable on the funds held in T&T's account, subject to the approval of the THA; arranging for the profits generated by the financing program to go into a THA trust account; working with the THA to arrange collateral, if required, for the financing program selected by the THA; and investigating and arranging the lowest interest rates, if required, for the THA's selection and approval.

The THA's responsibilities under the MOU included: providing the most feasible and high priority projects for financing; getting all the necessary government approvals to implement the financing program selected by the THA from those submitted by Sorsby; executing all documents

2. As noted by the district court, the MOU states that it is between the THA and Sorsby, rather than the THA and the plaintiff Can-Am. The district court did not decide "whether the party designation was part of an on-going misrepresentation or merely a drafting error."

necessary to implement the selected financing program; and arranging all necessary government collateral as required.

The MOU states in paragraph 1.1, "All matters that require financial commitments by the THA shall be brought to the notice of the THA for agreement before any final commitments are made."

The MOU's fee clauses provide that:

> THA agrees to pay the Financial Consultant a fee equal to ten percent (10%) of all monies earned from the private placement (or other funding programs) out of funds provided to THA generated by the funding program arranged by the Financial Consultant. . . .
>
> In the event that THA selects a form of conventional financing from the financing structures submitted by the Financial Consultant, the parties shall negotiate . . . a fee agreeable to both parties to compensate the Financial Consultant for the services in arranging such financing.

As to duration, the MOU states:

> 1.4 The agency appointment will remain in effect from the time trading begins or as long as THA is receiving funds through any trading programs of financial arrangements provided by the Financial Consultant . . . .

> 1.5 This agency appointment can only be revoked in writing if the Financial Consultant fails to perform on the terms of this MOU.

Furthermore, the MOU has a choice of law provision: "This MOU and all amendments thereto shall be governed and constructed in accordance with the laws of the Republic of Trinidad and Tobago."

The THA did not pursue the financing program outlined in Sorsby's February 5th letter. In early April 1999 Sorsby arranged for the THA officials to travel to London, England, for a series of meetings where various individuals presented investment opportunities for the THA's consideration.[3] One proposal came from a London firm called the Bower Cotton Group, for which payment was guaranteed by a bank in Switzerland. The proposal required Appellees to invest ten million United States dollars. Three days afterwards,[4] Sorsby wrote the THA's Chief secretary:

> We have wonderful and timely news for the THA. Bower Cotton ... [has] available at the present time US$100 million dollars of good clean funds. They have an investor they are placing into the program. Because of the investor's contract with Bower Cotton ... we are on a short time fuse [sic].

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3. Although Appellees originally sought conventional financing proposals, it considered financing through investment.

4. The letter erroneously bears the date March 12, 1999. It should have been dated April 12, 1999.

After requesting a letter of intent, proof of funds, and pay orders, Sorsby wrote, "We must have these things in order to get your contract issued from the bank for your review and approval." Regarding the pay orders, she wrote, "Remember our pay orders are generated through the trade, so if you do not go forward with the contract, these pay orders will be worthless."

Thus, upon returning to Tobago, the House Chief Secretary executed various documents related to the Bower Cotton proposal including a letter of intent, an "Irrevocable Pay Order" ("pay order"), and a letter of exclusivity. These documents explicitly reference a code specifically designated for the Bower Cotton proposal and are signed by the THA Chief Secretary Charles. The documents are dated April 19, 1999, but were signed on April 30, 1999.

The letter of intent is addressed to Peter Newton,[5] the program manager for the potential investment, and states, "I herewith grant you the exclusive right to provide me with the best available investment program to facilitate the private placement of these funds." The letter provides that the THA Chief Secretary is "willing and able to enter $ Ten Million US [sic] dollars for participation into a private bank-secured investment programme, subject to my [the Chief Secretary's] approval of the contract."

The pay order provides that Sorsby, in her individual capacity, will receive "[a] total of 10% (Ten Percent) of the

5. Appellees identify Newton as an affiliate of Nikea, N.V. ("Nikea"), an engineering company that Sorsby alleges would have helped to construct the THA's projects.

net disbursable profits received by [the THA] or any Company on their behalf to facilitate the investment transaction...." The pay order names Sorsby as the beneficiary. It also states, "The Irrevocable Pay Order is valid upon commencement of the start of the transaction herein...." The pay order also includes a waiver of immunity rights, and it submits the transaction to governance under the International Chamber of Commerce Rules of Conciliation and Arbitration.

The letter of exclusivity is also addressed to Newton and states in relevant part: "I [Charles], the undersigned, herewith grant the trade program manager/administrator/facilitator full exclusive right as our sole agent for 20 banking days from the above date [April 19, 1999], to enter these funds for me, or the corporation into the best available bank-secured investment program."

Despite Sorsby's recommendation to accept the Bower Cotton proposal and a letter from her stating that there was a short window of time to decide, the THA did not fund the Bower Cotton proposal. On July 11, 1999, Sorsby wrote an email to Rennie Dumas, a staff member at the THA, and stated, "... I cannot afford to keep giving away my services.... [T]he letter [Charles] prepared and the payorder [sic] meant nothing since [the THA] did not go forward." Sorsby continued to submit investment proposals to the THA, which rejected them all. On March 7, 2000, Sorsby wrote a letter addressed to Charles expressing her frustration with the THA: "I have always tried to get you what you need, lawyers, funding etc. [sic], and have not ever charged you a dime." Thereafter, some THA officials met with some financiers

introduced by Sorsby, but did not enter into any agreement with them. The THA never obtained or received any money from any financing source introduced by Sorsby or Can-Am.

II

In November 2001, Can-Am filed a complaint against T&T and the THA in the District Court for the Southern District of Texas. It later filed an amended complaint to include a claim for quantum meruit. T&T and the THA filed a motion to dismiss, or alternatively, a motion for summary judgment based primarily on the Foreign Sovereign Immunity Act (FSIA). The district court denied the motion because it needed discovery to decide the issue of whether the FSIA applied to Appellees.

After discovery, in April 2004, T&T and the THA filed a motion for summary judgment claiming the court did not have jurisdiction over Can-Am's claims pursuant to the FSIA. Alternatively, they argued for summary judgment because no genuine issue existed as to any material fact, and that both T&T and the THA were entitled to judgment as a matter of law for all claims.

On September 8, 2005, the district court judge dismissed Can-Am's claim for lack of subject matter jurisdiction. It concluded that the FSIA precluded the court from reaching the merits of the case, reasoning that "there is no basis to overcome [Appellees'] presumption of immunity." The district court denied Can-Am's motion for reconsideration on November 23, 2004.

Appendix A

III

Can-Am appeals the district court's entry of final judgment dismissing its action for lack of subject matter jurisdiction after having found no exception to sovereign immunity applies to Appellees. Can-Am argues that Appellees are subject to jurisdiction under two exceptions to its sovereign immunity under the FSIA, the waiver exception and the commercial activity exception.

The existence of subject matter jurisdiction under the FSIA is a question of law which is reviewed *de novo*. *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana S.C.*, 923 F.2d 380, 386 (5th Cir. 1991). The FSIA provides a framework for determining whether a court within the United States may exercise jurisdiction over a foreign state. The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in a court in the United States. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Under the FSIA, a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless one of the several statutorily defined exceptions applies. 28 U.S.C. § 1604; *see Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-89 (1983) ("When one of [the] specified exceptions applies, 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.'") (citing 28 U.S.C. § 1606). The exceptions are enumerated in 28 U.S.C. § 1605.

Appendix A

Courts must apply the FSIA "in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden*, 461 U.S. at 493. The party claiming FSIA immunity must establish a prima facie case that it satisfies FSIA's definition of a foreign state, thereby creating a presumption of immunity. *United States v. Moats*, 961 F.2d 1198, 1205 (5th Cir. 1992); *see also Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1470 (9th Cir. 1995). Then, the burden of production shifts to the non-movant to provide facts showing that an exception applies. *Moats*, 961 F.2d at 1205. To overcome a presumption of immunity, Can-Am must prove that the conduct that forms the basis of its complaint falls within one of the statutorily defined exceptions. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610-11 (1992); *see* 28 U.S.C. 1605 (exceptions to the jurisdictional immunity of a foreign state). Because it is undisputed that T&T is a foreign state and that the THA is T&T's instrumentality as defined in 28 U.S.C. § 1603, under the FSIA, they enjoy a presumption of immunity. Accordingly, the issue of subject matter jurisdiction turns on whether Can-Am rebuts the presumption of immunity enjoyed by T&T and the THA.

Two FSIA immunity exception provisions are at issue. The first is section 1605(a)(1), which discusses waiver. The second is section 1605(a)(2), which discusses commercial activity. It is Can-Am's burden to show that Appellees waived their immunity, or that Appellees' conduct that forms the basis of Can-Am's complaint is commercial activity as defined by

the FSIA. A failure to satisfy the statute's exceptions deprives a federal court of subject matter jurisdiction. *Stena*, 923 F.2d at 386.

A. *Whether T&T or the THA waived their immunity*

Neither T&T nor the THA waived sovereign immunity with respect to the conduct upon which Can-Am's complaint stands, because the document containing the waiver clause was conditional, and the condition never occurred.

Subsection (a)(1) states:

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver[.]

28 U.S.C. § 1605(a)(1).

To be effective, a waiver of sovereign immunity must be either implicit or explicit. FSIA's "waiver exception is narrowly construed." *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 482 (5th Cir. 1998).[6]

The district court held that the waiver of immunity rights in the Bower Cotton pay order was "ineffective" and "condition[al]." The district court stated:

6. Here, only an explicit waiver is at issue.

> [T]he pay order was never executed because no [THA] funds ever transferred to the disbursement account. In fact, the transaction ended with the [THA]'s decision to withhold its funds. Without the transfer of funds, there is no transaction and therefore, no pay order. Hence, there is no waiver.

Can-Am disagrees with the district court's reasoning. It claims the waiver of immunity rights in the Bower Cotton pay order is a general express waiver. The gravamen of Can-Am's argument is that the pay order is by its own terms "valid upon the commencement of the start of the transaction herein," such that the transaction began with Charles's submission of the pay order, the letter of intent, and the letter of exclusivity. Can-Am therefore claims that the THA's "decision" to withhold funds was a breach of its "obligation" to fund.

In addition, Can-Am argues that the district court's assertion that "[n]o evidence has been proffered that the Chief Secretary ever approved the contract to fund the Bower Cotton proposal" is false. It refers to the letter of intent, saying that Charles "expressly approved the transaction" by signing it. Can-Am then makes the leap that Charles approved the "contract" through the letter of exclusivity by "granting the trade program manager/administrator/facilitator full exclusive right as our sole agent for 20 banking days ... to enter the funds ... in the best available bank-secured investment program." Thus, Can-Am maintains that a contract was formed through the THA's submission of these documents.

Finally, Can-Am takes issue with the notion that the waiver is conditional on the funding of the Bower Cotton proposal. Can-Am states, "[t]here is no language in the waiver provision or any other evidence before the district court that limits or conditions in anyway the explicit waiver." Can-Am focuses on the word "all" in the waiver clause found in the pay order:

> This document binds all parties, their employees, associates, transfers, assigns and/or designees. Any facsimile of this document shall be deemed as legal and binding on all parties hereto and shall be so construed to any court of law regardless of State, nation, or Province waiving *all* rights of immunity, regardless of whether diplomatic, sovereign or otherwise, which shall give this document full force and legal effect to true purpose and intent of this agreement as so construed by its signing parties.

(Emphasis added.) Thus, Can-Am argues that the waiver clause in the pay order is explicit and unconditional.

Appellees maintain that Can-Am's argument "is based on a strained interpretation of language in a document ostensibly prepared for a transaction that never occurred...." They emphasize that without a transfer of funds in connection with the Bower Cotton proposal, there was no transaction. Without a transaction, there is no applicable waiver.

We agree with the district court that "the alleged waiver was a limited waiver." The waiver is contained in a document

that references a specific investment transaction for which there is no contract. The waiver is limited in its scope, applying solely to the Bower Cotton proposal. The pay order specifically references the code designating the Bower Cotton proposal. The word "all" in the waiver clause is also conditioned on the funding of the Bower Cotton proposal. The payment authorized by the order is conditioned on the investment transaction, which in turn relied on the THA's approval of and signature on a contract between it and the bank. There was no investment transaction in relation to the Bower Cotton proposal. Sorsby's contingency fee depended on profits generated by an investment that was never made; the THA never signed a contract with a bank in relation to such an investment. The waiver clause exists within a document that specifically relates to an investment transaction which never transpired. Thus, the waiver of "all rights of immunity" also relates to the investment transaction which never transpired. We find that Appellees did not waive their sovereign immunity.

B. *Whether T&T's/the THA's conduct fits the commercial activity exception*

Foreign sovereigns are not immune from judicial process in actions based upon commercial activity that has a jurisdictional nexus with the United States, as defined by the FSIA. *Stena*, 923 F.2d at 386 (citing 28 U.S.C. § 1605(a)(2)). Because Can-Am's action is not based upon a commercial activity that has a jurisdictional nexus with the United States, Appellees remain immune.

Appendix A

In order to decide whether the commercial activity exception applies, first, the relevant activity must be identified. "This requires focusing on the acts of the named defendant, not on other acts that may have had a causal connection with the suit. In particular, we must isolate those specific acts of the named defendant that form the basis of the plaintiff's suit." *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1391 (5th Cir. 1985) (citation omitted).

Second, the court must determine if the relevant activity is sovereign or commercial. The statutory definition of "commercial activity" is "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d).[7] The second sentence of § 1603(d) directs the courts to look at the "nature" of an activity rather than its "purpose" in determining whether it is commercial. Thus, the Supreme Court has defined an activity as having a commercial nature for purposes of FSIA immunity if it is of a type that a private person would customarily engage in for profit. *Weltover*, 504 U.S. at 614; *Callejo v. Bancome, S.A.*, 764 F.2d 1101, 1108 n.6 (5th Cir. 1985). A foreign government's acts may be deemed commercial when that foreign government is not acting "as

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7. Courts have accepted that the circular definition for "commercial activity" in § 1603(d) was a mandate by Congress authorizing the courts to define the concept on an case-by-case basis. *See* H.Rep. No. 9401487, 94th Cong., 2d Sess. at 16 (stating that federal courts are given "a great deal of latitude in determining what is a 'commercial activity'" under the FSIA). The statute does give us some guidance, however, in approaching the task of distinguishing between sovereign and commercial activities, as discussed below.

a regulator of the market, but in the manner of a private player within it."[8] *Weltover*, 504 U.S. at 614.

Finally, if the relevant activity is commercial in nature, the court must determine whether it had the requisite jurisdictional nexus with the United States. A foreign state will not be immune in a case

> [a] in which the action is based upon a commercial activity carried on in the United States by the foreign state; or [b] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [c] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]

28 U.S.C. § 1605(a)(2). Any one of these connections with the United States, if met, provides a sufficient basis for jurisdiction. *Stena*, 923 F.2d at 386.

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8. Courts have typically held that contracts for the procurement of goods and services are commercial rather than governmental in nature. *See United States v. Moats*, 961 F.2d 1198, 1205 (5th Cir. 1992) (contract for settlement agreement is commercial); *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 581 (7th Cir. 1989) (contract for purchase of medical services is commercial); *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1550 (D.C. Cir. 1987) (contract for developing rural areas is commercial); *Tex. Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 310 (2d Cir. 1981) (contract for purchase of cement is commercial).

Stena further states, "[n]ot only must there be a jurisdictional nexus between the United States and the commercial acts of the foreign sovereign, there must be a connection between the plaintiff's cause of action and the commercial acts of the foreign sovereign." *Id. See also NYSA-ILA Pension Trust Fund v. Garuda Indonesia*, 7 F.3d 35, 38 (2d Cir. 1993) ("In construing the commercial activity exception, courts have required that a significant nexus exist between the commercial activity in this country upon which the exception is based and a plaintiff's cause of action.") (citations omitted); *Moats*, 961 F.2d at 1205-06; *Vencendora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 200 (5th Cir. 1984). The phrase "'[based upon'] is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). The court must therefore focus only on the conduct on which Can-Am's action is based. *Id.* at 356.

Can-Am's action is based on the appointment of Sorsby as financial consultant for Appellees and the MOU defining Sorsby's and the THA's responsibilities. It argues that the MOU is an enforceable contract for Can-Am's services. Thus, Can-Am argues that T&T and the THA are subject to jurisdiction under each of the three parts to the commercial activity exception.

1. *Commercial activity in the United States*

Section 1603(e) of the FSIA states: "A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States."

The district court held that Can-Am failed to present any evidence indicating that T&T or the THA carried on any activity that had substantial contact with the United States. It went on to state that none of the THA's relevant activities, including its appointment of Sorsby as its financial consultant and its consideration of various financing and investment proposals, occurred in the United States. However, Can-Am disputes this conclusion, pointing to Sorsby's acts "as CEO of Can-Am, conducting financial consulting services for and on behalf of [Appellees], as their agent and financial consultant, in the United States." Can-Am invokes agency theory to meet the requirement that the requisite acts be those of the named defendant.

Appellees respond that Can-Am has not alleged anywhere that Appellees engaged in any commercial activity in the United States. Rather, they point out that all meetings between Can-Am and T&T or the THA occurred in either Trinidad & Tobago or London, and that all documents were signed in Tobago. Appellees also state that the THA "declined to participate in [an] alleged investment opportunity that would have required representatives to travel to New York and deposit funds in an unnamed bank there...." Appellees do not respond to Can-Am's allegation that Sorsby was T&T's and/or the THA's agent, likely because Can-Am did not substantiate its theory.

In order for Can-Am's claim under this prong to survive, the commercial acts must be of the named Defendant. *De Sanchez*, 770 F.2d at 1391 (citation omitted). Can-Am argues that, as financial consultant, it acted as Appellees' agent and that its actions can be imputed to T&T and the THA.

Can-Am cites to *Weltover* to support its contention. But, as Appellees identified in their brief, *Weltover* does not conclude that the acts of the plaintiff within the United States may be attributed to the defendant to defeat sovereign immunity. Rather, it is the acts of the foreign government that determine if the foreign sovereign's acts are "commercial" within the meaning of the FSIA. *Weltover*, 504 U.S. at 614-16.

The burden of proving an agency relationship, which would enable Can-Am to hold T&T and the THA liable, falls upon Can-Am. *See Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1381 (5th Cir. 1992). "Our precedent ... indicates ... we look to the ownership and management structure of the instrumentality, paying particularly close attention to whether the government is involved in day-to-day operations, as well as the extent to which the agent holds itself out to be acting on behalf of the government." *Id.* at 1382 (citing *Hester Int'l Corp. v. Fed. Rep. of Nigeria*, 879 F.2d 170, 178, 181 (5th Cir. 1989)). The record does not support the allegation that Appellees, as the supposed principal to Sorsby's agent, had both the right to assign Sorsby's task and control the means and details of the process by which she would accomplish it. Can-Am did not meet its burden of proof in proving the existence of a principal-agent relationship between it and Appellees.[9]

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9. Can-Am also points to Texas law, citing *Holloway v. Skinner*, 898 S.W.2d 793 (Tex. 1995), for the proposition that the acts of an agent on behalf of the principal are deemed to be the principal's acts. Even if we chose to rely on Texas law, Can-Am's argument would fail since it does not cite any facts to show it was controlled

(Cont'd)

Appendix A

Since Can-Am does not identify acts carried on in the United States having substantial contact with the United States by the named Appellees, we lack jurisdiction over Appellees under this prong of the commercial activity exception.

2. *Acts performed in the United States in connection with commercial activity elsewhere*

Acts of a foreign sovereign in the United States in connection with foreign commercial activity may give rise to subject matter jurisdiction. *Stena*, 923 F.2d at 388. In *Stena*, the court held that the connection between the commercial activity and the plaintiff's complaint had to be material. *Id.* "Any material connection between 'commercial activity elsewhere' and the plaintiff's complaints ... is irrelevant to the determination of subject matter jurisdiction." *Id.* at 388. The material connection must be between the act performed in the United States and the plaintiff's cause of action. *Pere*, 150 F.3d at 482.

The district court disposed of Can-Am's argument with regard to this prong in one sentence, which stated that "this prong does not apply because the facts do not identify a commercial act performed in the United States."

(Cont'd)

by T&T and the THA. *See Walker Ins. Servs. v. Bottle Rock Power Corp.*, 108 S.W.3d 538, 549 (App. Ct. Tex. 2003) (stating that the defining feature of the agency relationship is the principal's right to control the actions of the agent).

Can-Am argues we have jurisdiction because Sorsby traveled throughout the United States to meet and negotiate with potential investors, and that Sorsby was Appellees' agent, whose acts are imputed to Appellees. Appellees respond that since the proposed transaction with a third party never occurred, Can-Am cannot satisfy this prong of the commercial activity exception requiring that an act be performed in the United States.[10]

Can-Am asserts that its financial consulting services are the "commercial act[s] performed in the United States." In the instant case, the material connection must exist between Can-Am's financial consulting services and Appellees' alleged breach of contract, fraud, or negligent misrepresentation. First, there is a question as to whether Sorsby's acts in the United States qualify as "commercial activities." There are no cases to support the notion that investigating potential investment options constitute commercial activity under the FSIA. Second, Can-Am's allegation that it acted as an agent of Appellees is not substantiated. Third, it is illogical that plaintiff's own acts create the required material connection underlying its cause of action, because, after all, Can-Am maintains that it met its end of the bargain. Can-Am does not assert that Appellees performed any other commercial activities within the United States that give rise to its cause of action.

Another possible basis for Can-Am's claim is its contingent fee based on the breach of an alleged contract

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10. Appellee's brief also correctly notes, "In fact, Can-Am fails to allege in its Amended Complaint that either T&T [or the] THA has conducted any commercial activity anywhere."

entered into in Tobago. However, Can-Am's services were to be rendered in Tobago, and payment of Can-Am's contingent fee was to be paid, not from the United States, but from profits (if any) of the alleged investment program held in a Swiss bank. Therefore, we have no jurisdiction under this prong of the commercial activity exception.

3. *Commercial activity outside the United States that has a direct effect in the United States*

Finally, Can-Am argues that "the [Appellees'] breach caused a direct effect on the United States" because Sorsby, an American citizen and CEO of an American company, expected to be compensated for her work in the United States. The only direct effect claimed by Can-Am is the financial loss to Sorsby from Appellees' alleged breach.

The Supreme Court addressed the "direct effect" exception in *Weltover*, 504 U.S. 607 (1992). In *Weltover*, the plaintiffs held certain Argentine bonds. These bonds required Argentina to make payment of principal and interest to bondholders in U.S. dollars. Payment could be made through transfer on the London, Frankfurt, Zurich, or New York market, at the election of the creditor. When the bonds began to mature, Argentina unilaterally extended the time for payment and offered bondholders substitute instruments. The plaintiffs, two Panamanian corporations and a Swiss bank, refused to accept the rescheduling and insisted on full payment, specifying New York as the place where payment should be made. The plaintiffs then brought suit in the U.S. District Court alleging that Argentina's failure to pay the bonds according to the original terms was a breach of

contract. Jurisdiction was alleged under section 1605(a)(2) of the FSIA. The plaintiffs argued that Argentina's refusal to make payment caused a "direct effect" in the U.S. because payment that was supposed to have been made in New York was not made. The Supreme Court agreed. The Supreme Court stated that "an effect is 'direct' if it follows 'as an immediate consequence of defendant's ... activity.'" *Weltover*, 504 U.S. at 618 (citation omitted). After noting that the plaintiffs had designated their accounts in New York as the place of payment, the Court concluded, "Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 619.[11]

We agree with the district court that Can-Am's losses in pursuit of an acceptable investment opportunity for the Appellees are not enough to meet this prong of the commercial activity exception. Even if Can-Am did provide evidence of its financial losses, this prong still would not be met. It is undisputed that neither T&T nor the THA ever transferred money in connection with any alleged investment opportunity identified by Can-Am; hence, the type of activity

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11. Other examples of direct effect include when a defendant agrees to pay funds to an account in the United States and then fails to do so, *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 896 (5th Cir. 1998), and where a defendant's default on a letter of credit for which plaintiff had designated payment to its bank account in New York, *Hanil Bank v. PT. Bank of Negara Indonesia*, 148 F.3d 127, 132 (2d Cir. 1998).

found to be commercial in *Weltover* and other cases is absent here. Can-Am's alleged financial loss in the United States in and of itself is not enough to meet this prong of the commercial activity exception.

IV

Neither the waiver exception nor the commercial activity exception to the FSIA apply to Appellees. While the THA did include a waiver clause in the pay order, the pay order was conditioned on a transaction that never occurred, and the waiver itself never went into effect. Further, Appellees did not perform any commercial activities in the United States, nor did they perform any commercial activities in the United States with a material connection to the conduct that forms the basis of Can-Am's complaint. Finally, Appellees did not perform any commercial activities outside the United States that had a direct effect in the United States. Because no exception under the FSIA applies, Appellees are entitled to sovereign immunity. We AFFIRM.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ON MOTION FOR SUMMARY JUDGMENT ENTERED SEPTEMBER 8, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

C.A. NO. H-01-3897

CAN-AM INTERNATIONAL, L.L.C.,

Plaintiff,

v.

THE REPUBLIC OF TRINIDAD AND TOBAGO and the TOBAGO HOUSE OF ASSEMBLY,

Defendant.

MEMORANDUM AND ORDER
(Entered September 8, 2004)

I. INTRODUCTION

This is a contract action wherein the plaintiff asserts state law causes of action for breach of contract, fraud, negligent misrepresentation, and promissory estoppel against a foreign state. The plaintiff, Can-Am International, L.L.C., is an American company registered in the state of Texas. Laura Lee Sorsby is its founder and CEO. The defendants are the Republic of Trinidad and Tobago and its political subdivision,

the Tobago House Assembly. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the defendants have submitted motions for summary judgment. Having considered each party's submissions, the Court is of the opinion that subject matter jurisdiction does not exist.[1] Accordingly, the Court concludes that this case should be DISMISSED.

II. HISTORY

The Republic of Trinidad and Tobago ("Republic") is comprised of two islands in the Caribbean Sea near Venezuela. After achieving independence from Great Britain in 1962, the Republic central government established the Tobago House of Assembly ("House") to administer Tobago Island. It is undisputed that the Republic is a foreign state and that the House is a Republic instrumentality. Responsibility for the House Office of Chief Secretary includes planning Tobago Island development projects. At all relevant times, the House Chief Administrator or Chief Secretary was either Allan Richards ("Richards") or Hochoy Charles ("Charles").[2]

1. While the pleadings and the plaintiff's response to the defendants' motion to dismiss for lack of subject matter jurisdiction initially indicated proper jurisdiction, the Court could not perceive an actual lack of subject matter jurisdiction until the parties conducted further discovery.

2. The position's actual title or who held it at what particular time does not affect the case's disposition. The Court notes, however, that the dates and titles from the parties' submissions do not coincide. *See*, Defs.' Mem. Mot. Summ. J. Doc. 86, p. 3 (Charles referred to as House Chief Sec'y in Jan. 1998); p. 4 (Richards as Chief Admin. in Nov. 1998); Pl.'s Mem. Mot. Summ. J. Doc. 99, p.4 (Richards as Chief Admin. in Mar. 1998); p. 5 (Richards as Chief Sec'y in Nov. 1998); and p. 6 (Charles as Chief Sec'y in Feb. 1999).

Appendix B

In 1998, Laura Lee Sorsby ("Sorsby") initiated contact with the House Office of Chief Secretary and offered her services as a financial consultant. She learned that the House needed financing for various development projects. Shortly thereafter, Sorsby incorporated Can-Am International, L.L.C. ("Can-Am") and began submitting finance proposals to the House. None of the proposals were accepted. In early 1999, however, Chief Secretary Charles allocated House office space to Sorsby and formally appointed her to be the House's financial consultant. On March 27, 1999, the parties executed a Memorandum of Understanding in Tobago.[3] The Memorandum recites that the House is considering three projects for financing and that Sorsby is the House's "Financial Consultant" with authority to oversee the financing process. In relevant part, the Memorandum fee clauses provide that the:

> House agrees to pay the Financial Consultant a fee equal to ten percent (10%) of all monies earned from the private placement (or other funding programs) out of funds provided to the House generated by the funding program arranged by the Financial Consultant. . . .
>
> . . . .
>
> In the event that the House selects a form of conventional financing from the financing

3. The MOU states that it is between the House and Sorsby rather than the plaintiff, Can-Am. The Court has not decided whether the party designation was part of an on-going misrepresentation or merely a drafting error.

> structures submitted by the Financial Consultant, the parties shall negotiate . . . a fee agreeable to both parties to compensate the Financial Consultant for the services in arranging such financing.

Regarding duration, the Memorandum provides that "[t]his Memorandum shall remain in effect as long as the House is receiving funds through any trading programs or financial arrangements provided by the Financial Consultant." Finally, the Memorandum has a choice of law provision that selects Republic law as the basis for governance and construction.

In April 1999, Sorsby arranged for House officials to travel to London, England for a series of meetings where various individuals presented investment opportunities for the House's consideration. One proposal came from a London firm called the Bower Cotton Group. Upon returning to Tobago, the House Chief Secretary received and executed various documents related to the Bower Cotton proposal including a letter of intent and an Irrevocable Pay Order ("pay order").[4] The letter of intent provides that the House Chief Secretary is "willing and able to enter Ten Million US dollars for participation into a private bank-secured investment programme, subject to my [the Chief Secretary's] approval of the contract." The pay order provides that Sorsby, in her individual capacity, will receive "[a] total of 10% (Ten Percent) of the net disbursable profits received by [the House]

4. The plaintiff submitted a "letter of intent" at Doc. 100, tab 7. That letter of intent, however, is not the same as the letter that the plaintiff submitted with Doc. 14 in reference to the Bowers Cotton proposal and the defendant's alleged immunity waiver.

or any Company on their behalf to facilitate the investment transaction. . . ." The pay order also includes a waiver of immunity rights, and it submits the transaction to governance under the International Chamber of Commerce Rules of Conciliation and Arbitration.

Despite Sorsby's recommendation to accept the Bowers Cotton proposal and a letter from her stating that there was a short window of time to decide, the House declined to fund the Bowers Cotton proposal. Undeterred, Sorsby continued to submit investment proposals, and the House rejected them all. On March 7, 2000, Sorsby revealed her frustration with the House's resistance in a letter to the Chief Secretary. In addition to stating that she was "upset," she remarked "I have always tried to get you what you need, lawyers, funding, etc., and have not ever charged you a dime." In response, the House agreed to consider several more proposals but refused them as well.

In November 2001, Sorsby instituted this action on Can-Am's behalf. Can-Am contends that the Memorandum was a contract and that the House breached it by not funding any of the investment proposals. In addition to denying the existence of any enforceable contract, the Republic and the House contend that their undisputed status as a foreign state precludes subject matter jurisdiction without exception. In response, the plaintiff avers that the letter of intent, executed in concert with the Bowers Cotton proposal, waives immunity and that, in the alternative, the "commercial activity" exception applies.

Appendix B

III. SUBJECT MATTER JURISDICTION

The law requires the Court to maintain subject matter jurisdiction at all times. *Ceres Gulf v. Cooper,* 957 F.2d 1199, 1207 (5th Cir. 1992). Any party or the court can raise issues of subject matter jurisdiction at any time. FED. R. CIV. P. 12(h)(3). With regard to foreign states, maintaining subject matter jurisdiction is particularly important because, unlike other litigants, foreign states are immune from jurisdiction in United States courts. *See* 28 U.S.C. § 1604. Immunity is not merely the right to avoid liability; it also includes the freedom to remain exempt from the burdens of the judicial process. *See Kelly* v. *Syria Shell Petroleum Dev. B.V,* 213 F.3d 841, 849 (5th Cir. 2000). In observance of comity, the United States grants foreign states a presumption of immunity. *See Conn. Bank of Commerce* v. *Republic of Congo,* 309 F.3d 240 (5th Cir. 2002). The presumption of immunity, however, may be rebutted in accordance with the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ("FSIA"). The FSIA applies to foreign states and their political subdivisions. *Id.* at § 1604. Can-Am does not dispute that the Republic is a foreign state and that the House is its political subdivision. Accordingly, the issue of subject matter jurisdiction turns on whether the FSIA rebuts the presumption of immunity enjoyed by the Republic and the House. Based on the facts before the Court, only two FSIA immunity exception provisions apply to this case. The first is section 1605(a)(1) ("waiver"). It applies to a foreign state that "has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect, except in accordance with the terms of the waiver[.]" *Id.* at § 1605(a)(1). The second is

section 1605(a)(2) ("commercial activity"). A discussion on the commercial activity exception is below.

Citing the FSIA's waiver provision, Can-Am contends that no immunity exists because the House executed a pay order agreement that contained a waiver clause. After a thorough review, the Court finds that the alleged waiver is ineffective. The evidence before the Court clearly demonstrates that the House executed the alleged waiver in concert with the Bowers Cotton Group transaction. The documents for that transaction each use the reference code: "House/9904-001." The alleged waiver is a clause within the unique pay order document for the transaction. In addition to identifying the specific transaction to which the pay order applies, the pay order explicitly states that "[u]pon execution of this agreement, this Irrevocable Payment Order will be executed, following settlement and clearance of funds into the Disbursement Account for the first and subsequent tranches."[5] Accordingly, the pay order was never executed because no House funds ever transferred to the disbursement account. In fact, the transaction ended with the House's decision to withhold its funds. Without the transfer of funds, there is no transaction and, therefore, no pay order. Hence, there is no waiver.

In fact, the alleged waiver was a limited waiver. The waiver applied only in the context of the Bowers Cotton transaction. The Court observes that the waiver is conditional.

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5. *Tranche*: "A bond issue derived from a pooling of similar debt obligations." Black's Law Dictionary 1503 (7th ed. 1999). The Bowers Cotton proposal was an attempt to pool a potential House investment with other investments to purchase an initial tranche.

Its validity is conditioned on the funding of the Bowers Cotton proposal. That did not occur. Recall that the proposal's letter of intent explicitly states that the House's participation is ultimately subject to the Chief Secretary's approval of the contract. No evidence has been proffered that the Chief Secretary ever approved the contract to fund the Bowers Cotton proposal. In fact, the Chief Secretary's decision to withhold funding demonstrates the opposite. Hence, the Court finds that the Republic and the House have not waived their immunity under the FSIA section 1605(a)(1).

Turning to the FSIA section 1605(a)(2), the Court has reviewed the parties' submissions and finds that the commercial activity exception does not apply to the Republic or the House. The commercial activity exception has three prongs. The first creates an exception if a foreign state carries on a commercial activity in the United States. 28 U.S.C. § 1605(a)(2). Section 1603(e) defines commercial activity. It provides that "[a] commercial activity carried on in the United States by a foreign state means commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e).

Can-Am has failed to present any document indicating that the Republic carried on any activity having substantial contact with the United States. The House's relevant activities included appointing Sorsby as its financial consultant and, thereafter, considering various investment proposals. However, none of these activities occurred in the United States. The House appointed Sorsby in Tobago and provided an office for her in Tobago. The House also negotiated and executed the Memorandum in Tobago. No facts in the record

indicate that the House considered any proposals in the United States. The record does, however, reflect that Sorsby arranged for proposals to be considered in England. Moreover, the record reflects that the House declined an opportunity to consider a proposal in New York. In sum, it is clear that no commercial activity occurred in the United States.

The second commercial activity prong creates an immunity exception if the action is based "upon an act performed in the United States in connection with the commercial activity of a foreign state elsewhere[.]" *Id.* Again, this prong does not apply because the facts do not identify a commercial act performed in the United States.

Finally, the third commercial activity prong precludes immunity when an action is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]" *Id.* The plaintiff alleges that the Republic and the House breached a contract to allow Sorsby to act as the House's financial consultant. Even if the Court allows that the Memorandum was a bona fide contract, it explicitly limits Sorsby's compensation to ten percent of monies earned from funding programs. The evidence fails to demonstrate that any monies were earned. In fact, Can-Am's contract claims arise from the House's decision not to fund the investment proposals that she presented. Considering that the House was never bound to accept any proposal, the fact that Sorsby did not make money on *her* investment is not a legitimate basis for a breach of contract claim. In any event, the House's unfettered decision to decline

investment opportunities that could have enured to the plaintiff's benefit in this Country is certainly not a basis to assert that the Republic and the House caused a direct effect in the United States.

IV. CONCLUSION

In light of the discussion above, the Court finds that there is no basis to overcome the Republic and House's presumption of immunity. Accordingly, the Court lacks subject matter jurisdiction and this case must be DISMISSED.

It is so ORDERED.

Signed this 8th day of September, 2004.

s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON PETITION FOR REHEARING DATED MARCH 30, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-20007

CAN-AM INTERNATIONAL, LLC,

Plaintiff-Appellant,

v.

THE REPUBLIC OF TRINIDAD AND TOBAGO; THE TOBAGO HOUSE OF ASSEMBLY,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas, Houston Division

ON PETITION FOR REHEARING

Before GARWOOD, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

Appendix C

ENTERED FOR THE COURT:

s/ Edward C. Prado
United States Circuit Judge

APPENDIX D — ORDER OF UNITED STATES DISTRICT COURT ON MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT ENTERED NOVEMBER 23, 2004

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-01-3897

CAN-AM INTERNATIONAL, L.L.C.,

Plaintiff,

v.

THE REPUBLIC OF TRINIDAD AND TOBAGO
and the TOBAGO HOUSE OF ASSEMBLY,

Defendant.

ORDER

Before the Court is the plaintiffs motion for reconsideration of summary judgment (#119) and the defendant's response (#128), and the Court having reviewed same is of the opinion that the motion should be denied.

It is so Ordered.

Appendix D

SIGNED and ENTERED 11/23/2004

s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States District Judge

APPENDIX E — 28 U.S.C. §§ 1602, 1603, 1604, 1605(a)(1) and (2), AND 1606

UNITED STATES CODE TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

Appendix E

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

. . . .

Appendix E

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

APPENDIX F — APPELLANT'S PANEL PETITION FOR REHEARING

No. 05-20007

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CAN-AM INTERNATIONAL, L.L.C.,

Plaintiff-Appellant,

v.

THE REPUBLIC OF TRINIDAD AND TOBAGO and the TOBAGO HOUSE OF ASSEMBLY,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Texas

APPELLANT'S PANEL PETITION FOR REHEARING

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Appendix F

No. 05-20007

CAN-AM INTERNATIONAL, L.L.C.,

Plaintiff-Appellant,

v.

THE REPUBLIC OF TRINIDAD AND TOBAGO
and the TOBAGO HOUSE OF ASSEMBLY,

Defendants-Appellees.

Appellant's Panel Petition For Rehearing

TO THE JUSTICES OF THE FIFTH CIRCUIT COURT OF APPEALS:

Plaintiff-Appellant, Can-Am International, L.L.C., respectfully files this Appellant's Panel Petition for Rehearing in support of its appeal of the district court's dismissal of this action based on jurisdictional immunity under the Foreign Sovereign Immunities Act (the "FSIA"). For clarity, plaintiff-appellant will be referred to as "Ms. Sorsby" or "Can-Am." Defendants-Appellees will be referred to as "T&T and THA" or collectively as "the Government."

INTRODUCTION

The Panel Opinion's reasoning in this case is fundamentally flawed. First, even disregarding the undisputed fact that T&T and THA expressly waived immunity under the FSIA, the facts are undisputed with regard to the application of the commercial

activity exception to the FSIA. The Panel Opinion concludes that Can-Am did not prove the existence of a principal-agent relationship between it and the Government. Not only is this conclusion directly contrary to the written agency agreements between the parties, but the undisputed fact that Ms. Sorsby acted on behalf of the Government in the United States pursuant to these agency agreements. The existence of a formal, written agency relationship between the parties here makes this case different from the *Walter Fuller* case cited in the Panel Opinion.[1] The Panel Opinion is wrong when it concludes that Can Am did not substantiate its allegation that it acted as an agent for the Government.

Second, the Panel Opinion's conclusion that investigating potential investment options is not commercial activity is contrary to Supreme Court authority defining the term "commercial" under the FSIA. In *Weltover*, the Court held "commercial activity" means when a government's conduct is consistent with a "private player" in a market. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). The investigation of potential investment options in the open market is not conduct that is sovereign or governmental in nature, but clearly commercial activity.[2]

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1. The parties entered into an initial agency agreement and later entered into the Memorandum of Understanding, further clarifying the agency relationship between the parties. (R. 2279, 2277, 2276, 2275, 2267; Tab 7; R. 22327 [sic].)

2. The investigation of potential investment options is so clearly commercial and not governmental that even the counsel for T&T and THA had to agree at oral argument that the conduct in question here is commercial activity.

Third, the Panel Opinion concludes that it is "illogical that plaintiff's own acts create the required material connection underlying its cause of action." (Op. at 24.) Can Am's underlying causes of action are not based on Ms. Sorsby's acts in soliciting and investigating investment options on behalf of the Government but on the Government's breach of contract and failure to proceed with any funding proposals solicited on its behalf. The Panel Opinion's conclusion that the acts of Ms. Sorsby in the United States on behalf of the Government cannot be considered the commercial activity of the Government is contrary to and in direct conflict with fundamental principles of agency law.

Finally, the Panel Opinion's conclusion that the express waiver provision in this case was somehow conditional is contrary to the clear and unambiguous language of the waiver provision in question. Under the Panel Opinion's interpretation of an express waiver provision, any time a sovereign wrongfully breaches a contract with a United States citizen that contains a provision expressly waiving sovereign immunity, that sovereign will nevertheless be granted immunity because the contract containing the waiver was breached and not completed.

Appendix F

ARGUMENT

A. The Panel Opinion ignores important, dispositive facts.

The Panel Opinion ignores important undisputed and dispositive facts. Specifically, the Panel Opinion's holding in so far as the commercial activity exception is concerned is based on the false premise that the parties in this case did not have an agency relationship. It is undisputed that the parties entered into an initial written agency agreement. After Ms. Sorsby had arranged for several initial financing proposals and traveled to Tobago, and at the request of Hochoy Charles, the parties then over the course of two months negotiated the MOU. (R. 2372 at ¶6.) The MOU formalized details of the agency agreement. The Panel Opinion ignores the undisputed fact that Charles had the authority to and did create an agency relationship with Ms. Sorsby on behalf of the Government. (R. 2279, 2277, 2276, 2275, 2267; Tab 7; R. 2327). Ms. Sorsby worked at the request of the Government in 1997 and 1998 before the parties entered into the MOU. At the Government's request, Ms. Sorsby obtained several proposals for investment programs that would allow the country to invest money and create financing through the investment. If Ms. Sorsby failed to perform under the MOU, then the Government could revoke the agreement in writing. (R. 2318.) The agreement was never revoked.

The Panel Opinion also misstates the circumstances leading to the Government's breach in not going forward with the Bower Cotton Proposal. There is no dispute that Hochoy

Charles possessed the authority to bind the Government when he authorized the letter of intent, the proof of fund and the pay orders necessary to proceed with the funding proposal. (R. 2335, 2334, 2330, 2328.) After these documents were executed, Hochoy Charles issued the "Letter of Exclusivity," signed April 30, 1999, which granted the "trade program manager/administrator/facilitator full exclusive right as our sole agent for 20 banking days . . . to enter funds . . . into the best available bank-secured investment program." (Tab 10, R. 2331). Ms. Sorsby was required to and did obtain $100 million in funding to place in an appropriate investment program.[3] (Tab 13; R. 2357.) THA breached and reneged without explanation and continued to request financing proposals under its agency agreement with Ms. Sorsby. Ms. Sorsby complied with the Government's requests and provided alternative forms of financing throughout 1999.[4]

The Panel Opinion states that the Government rejected the various funding proposals submitted by Ms. Sorsby. There is no evidence that the Government formally rejected any of the proposals submitted by Ms. Sorsby. In so far as the Bower

3. The Panel Opinion implies that the payorders were "worthless" because the trade did not go forward. However, the payorders were effective upon the execution of the Letter of Exclusivity. The Letter of Exclusivity was executed, making the payorders effective. But for the Government's breach, the trade would have gone forward because Ms. Sorsby had already obtained the $100 million dollar [sic] commitment to fund the trade and the Government failed to fund its matching $10 million.

4. (Tab 12; R. 2370; 2301-2297, 2295-2263; 2266-2267, 2265, 2253-2254, 2294-2304, 2370, 2304-2303, 2301-2300, 2299-2297, 2295, 1869, 2252, 1902, 1900, 2259.)

Cotton proposal, the only evidence in the record concerning the reasons for the Government's breach were news reports, stating the money was not invested because of a political dispute between THA officials and the Prime Minister of Trinidad & Tobago. (R. 2227.) As late as January 24, 2000, Ms. Sorsby was still soliciting and presenting funding proposals to the THA. (R. 2153-2150 at 215-17, 220-25). THA continued to do business with Ms. Sorsby and at no time did the THA, or any other government representatives, ever cancel Ms. Sorsby's agency appointment and revoke the MOU. (R. 2150 at 219) (R. 2299).

B. The commercial activity exception applies.

Even disregarding T&T and THA's express waiver of immunity under the FSIA, the undisputed facts demonstrate that the commercial activity exception applies in this case. Contrary to the Panel's ruling, Ms. Sorsby's, as CEO of Can-Am, conducting financial consulting services at the written request of T&T and THA, and as their agent and financial consultant, in the United States means the Government carried on commercial activity having a substantial contact with and in the United States.

The Panel opinion relies on factors defined in *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines* to determine whether an agency relationship existed between Can-Am and T&T and THA, but ignores the distinguishing and dispositive fact that in this case there was a formal agency agreement between the parties. The *Walter Fuller* case did not involve an express agency agreement between the Philippine government and the PGCC. 965 F.2d 1375 (5th

Cir. 1992). Here, there is a written agency agreement between the parties. (R. 2318.) Hochoy Charles, with the proper authority as Chief Secretary of the THA, formally appointed Ms. Sorsby, CEO of Can-Am, as the Government agent and the financial consultant. (R. 2318.) As "financial consultant," Ms. Sorsby was granted "the authority and responsibility to oversee the financing process, on behalf of the Assembly." *Id.* The Panel Opinion's conclusion that Can-Am did not substantiate that it acted as the agent of Government simply ignores the undisputed record in this case.

Moreover, the Panel Opinion erroneously concludes that it is illogical that Ms. Sorsby's conduct in United States qualifies as the commercial activity of the T&T and THA on whose behalf and at whose request Ms. Sorsby acted in the United States. The Panel concludes "there are no cases to support the notion that investigating potential investment options constitutes commercial activity under the FSIA." (Op. at 24.) The FSIA defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d) (1988). The commercial character of an act must be determined by reference to the nature of the act and not its purpose. *Id.* Taken together, these two provisions mean that "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are commercial within the meaning of the FSIA." *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992) (holding sovereign's issuance of debt constituted commercial activity). To determine whether the foreign state acted in the manner of a private player in the market, the court must look

to the type of actions in which the foreign state engaged. *Id.* If the actions are the type that private persons are able to legally engage, then the actions are commercial under the FSIA. *See Rush-Presbyterian-St. Lukes Medical Cent. v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir.), *cert. denied*, 493 U.S. 937, 110 S.Ct. 333, 107 L.Ed.2d 322 (1989).

In *Weltover*, the United States Supreme Court held that a sovereign's issuance of debt instruments was commercial activity under the FSIA. The Court reasoned as follows:

> The commercial character of the Bonds is confirmed by the fact that they are in almost all respects garden-variety debt instruments: They may be held by private parties; they are negotiable and may be traded on the international market (except in Argentina); and they promise a future stream of cash income.

504 U.S. 607, 616, 112 S.Ct. 2160, 2167. It is difficult to understand how a sovereign's investigation of potential investment options would be any less commercial in nature than a sovereign's issuance of bonds as part of a plan to stabilize its currency, as was the case in *Weltover*.

Taking Can-Am's allegations as true, as this Court must, there is no question that the Government was acting a "private player" in directing its agent and financial consultant to seek in the United States investment opportunities from United States companies. It is undisputed that Ms. Sorsby engaged in many activities in the United States at the behest of the

Government that qualify as commercial activity.[5] For example, in 1999, Ms. Sorsby went to the United States at the request of the Government and negotiated with numerous people on the Government's behalf. The negotiations resulted in: (1) Ms. Sorsby submitted a funding program proposal from Gee & Jenson, an American company, headquartered in West Palm Beach, Florida (R. 2304, 2303, 2301, 2240); (2) Ms. Sorsby and Rennie Dumas, the THA's Business Analyst, continued their work in the United States and Tobago on funding program proposals (R, 2304, 2303, 2301, 2240); (3) Allan Richards wrote to Ms. Sorsby in the United States to set up meetings in Tobago (R. 2301-2297, 2295); (4) Can-Am was also pursuing potential funding programs in the United States through proposals made by Raymond James and Frankwell Investments, two additional American companies (R. 2370 at ¶18) (R. 2304-2294); and (5) the T&T Port Authority also contacted Can-Am regarding funding programs to finance port upgrades, and the Minister of Energy and Energy Industries regarding the Raymond James proposal. (R. 1869).

In 2002, at the request of the government: (1) Ms. Sorsby and government representatives continued working together in the United States and Tobago on funding programs by Raymond James and Frankwell Investments (R. 2304-2294); (2) Ms. Sorsby continued her efforts in the United States to secure funding proposals for the ferry project (R. 2252); (3) Allan Richards issued a formal invitation to the United States for scheduled meetings in Tobago for Raymond James and Frankwell Investments (R. 2297, 2295); and (4) the Chairman

5. The parties' agency agreement, the MOU, was negotiated in the United States.

of Petrotrin, the government owned oil company, wrote to Ms. Sorsby in the United States requesting a funding program proposal by Raymond James. (R. 1902, 1935).

In this case, there can be no question that Can-Am's conducting financial consulting services in the United States as the actual and apparent agent for a foreign government should qualify as a commercial act performed by a foreign state in the United States. The Panel Opinion's holding to the contrary is simply contrary to well-settled principles of agency law. *See Holloway v. Skinner*, 898 S.W.2d 793, 795 (Tex. 1995) (holding the acts of an agent on behalf of its principal are deemed to be the principal's acts).[6] On this record, both the first and second prongs of the commercial activity exception under the FSIA are satisfied.

In so far as the third prong of the commercial activity exception, there is no question that the Government's breach caused a direct effect on the United States. Ms. Sorsby is an American citizen and CEO of an American company who was to be compensated for her work in the United States. *See Id.* The Panel Opinion's narrow focus on the Bower Cotton transaction ignores the significant evidence of all the other financing opportunities Can-Am sought out, evaluated and proposed to the government pursuant to the both the [sic] MOU and agency appointments. At the urging of the Government, Ms. Sorsby, as CEO of Can-Am, and the duly appointed agent and financial consultant for the Government, dedicated three years performing the work requested of her

6. The Panel's suggestion that Can-Am did not cite any fact to show it was controlled by T&T and THA ignores the written agency agreement between the parties in this case.

by Government officials. (R. 1840-2095, 2373-2099.) Can-Am's claims against T&T and THA are for quantum meruit as well as breach of contract.

T&Ts and THA's wrongful conduct should not be rewarded by ignoring the explicit waiver or disregarding the true nature of the Government's commercial activities in the United States. The direct effect of T&T's and THA's wrongful conduct was on United States citizens and a United States company engaged by the government to solicit sources in the United States for commercial financing originating in the United States, and to create profits to fund critical infrastructure projects in the foreign country. The third prong of the commercial activity exception is, therefore, also satisfied.

C. The waiver provision in this case is not conditional.

The Panel's Opinion misapprehends the evidence in the record relating to the express waiver of immunity found in the irrevocable pay order. Contrary to the Panel Opinion, the plain language of the written transaction documents demonstrates that the express waiver of immunity in this case was "effective" and not "conditional." The THA, acting for and on behalf of T&T, agreed that it was "waiving *all rights of immunity regardless of whether diplomatic, sovereign, or otherwise* . . ." (emphasis added) (Tab 8; R. 2329, 2330). There is absolutely nothing in this language or the rest of the transaction documents in question that suggests this express waiver was conditional. *Id.* The Panel Opinion is clearly erroneous and allows a sovereign to benefit from its breach by granting immunity inspite [sic] of an express waiver of immunity.

Appendix F

As the documents clearly demonstrate, the Chief Secretary actually approved the contract in the Bower Cotton proposal under penalty of perjury. (Tab 10, R. 2331.) The failure to fund was *not* a "decision" made by the Chief Secretary and there is no language suggesting that the waiver was conditional on the government not breaching the agreement. (Tab 8; R. 2329, 2330.) The Panel's reasoning ignores the Government's clear and express waiver and allows any foreign state in breach of an agreement with an explicit waiver of immunity clause to use its own wrongful breach as a defense to waiver. That is clearly not the purpose of immunity under the FSIA. T&T and THA should not receive their reward of jurisdictional immunity because they chose to breach a written agreement. The Panel Opinion must be corrected.

Appendix F

Prayer

The record in this case calls for a jury trial, rather than the dismissal ordered by the district court. For the reason stated in its appellate briefing and in this motion for panel rehearing, Can-Am respectfully requests that the Panel grant this motion, withdraw its opinion, reverse the judgment of the district court, remand this case for a trial on the merits, and grant Can-Am all other relief to which it may be entitled.

Respectfully submitted,

s/ Alice Oliver-Parrott
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APPENDIX G — APPELLANT'S APPEAL BRIEF (PARTS OF PAGES 40-42)

No. 05-20007

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CAN-AM INTERNATIONAL, L.L.C.,

Plaintiff-Appellant,

v.

THE REPUBLIC OF TRINIDAD AND TOBAGO and the TOBAGO HOUSE OF ASSEMBLY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas

APPELLANTS' BRIEF

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Appendix G

* * *

d. The plaintiff performed

According to the defendants, Can-Am did not perform under any contract since it could not have performed. The defendants focused on a funding proposal that was undisputedly not reviewed, submitted or approved by Can-Am.[7] The defendants concede, as they must, that Can-Am did

7. Under the funding mechanism recommended by Can-Am, the trading program involved required the investment of $100 million for entry with 10% of that to be pledged by the THA. (R. 2371 at ¶11). Ms. Sorsby had secured a funding program with philanthropic interests with $100 million to invest if the THA invested $10 million. (Tab 13). The combined funds, $110 million, would be placed in an investment program to be managed by Mr. Peter Newton. The programs would leave $10 million at all times in an account that would be in the control of the THA only. Moreover, it was agreed that a bank guarantee, for a period of a year, would be purchased from a top 25 bank guaranteeing the $10 million invested by THA. Originally, THA was not supposed to be able to remove its funds for 12 months. However, the THA represented that it would need its funds sooner. Accordingly, Mr. Newton accommodated the THA and agreed that it would be able to remove its funds after only 3 months. A contract of $110 million was to be placed on the FOREX market. The profits from the trading of the entire $110-million fund would be placed into an account. For 12 months, any and all profits would be reinvested into the program and allowed to compound. After 12 months, 30% of the profits generated would be disbursed to the THA to fund the projects, 30% would be [sic] go to the investors that pledged the $100 million, and the remainder would be reinvested into the trade for an additional 12 months. The guarantee for the principle [sic] placed into the fund for the second year would

(Cont'd)

not propose or recommend the funding proposal THA asserts was fraudulent and a "sham investment opportunity." Without facts, the defendants resort to personal attacks meant only to impugn the integrity of Can-Am's CEO, Ms. Sorsby. Once again, "[c]redibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson,* 477 U.S. at 255. Contrary to the defendants' arguments, Ms. Sorsby performed her responsibilities as financial consultant under the MOU and did so based on the representations and assurances of THA of a productive relationship.

. . . .

(Cont'd)
be the same as the guarantee for the first year. This would be repeated each year until the projects were fully funded. Moreover, it could have been expanded to include the ferry project. It was anticipated that, after the first year, there would be sufficient funds to finance the water sewage treatment plant. The trading program that THA references in its motion is not the program proposed, reviewed or submitted by Ms. Sorsby.

APPENDIX H — LETTER FROM L. SORSBY DATED FEBRUARY 5, 1999

CAN-AM INTERNATIONAL, L.L.C.
5341 Pagewood Lane
Houston, Texas 77056

Phone: (281) 347-0685
(713) 623-4556
Facsimile: (713) 355-5721

Attention: Honorable Chief Administrator
Mr. Alan Richards
Tobago House of Assembly

From: Laura Lee Sorsby
CEO
Can-Am International L.L.C.

Date: February 5,1999

Dear Chief Administrator,

As you are aware we have been working with Rennie Dumas for the past four months putting together a safe scenario for the THA to get the financing they need for the water treatment plant, stadium, and road projects. We feel we have put together a creative financing structure for THA that will achieve the funding needed for the project without the Government having to depend on the success of the projects for debt servicing the loan.

Appendix H

I discussed this scenario the last time I was in Tobago. Since that time we have improved the program by putting up a fidelity bond issued by AIG, which is one of the top-rated insurance companies in the USA, to secure the funds placed into the program. This bond will secure all moneys if placed into our program from any fraud or any type criminal use. This bond will be placed into the Government's account prior to any program being started, and the Government does not have to come up with any moneys for this guarantee. The bond cost will not come out of the moneys the Government receives for the project. We are arranging the bond for you. We are arranging for the payment of this bond for you. It will be paid back out of the profits of the trade, but will not come out of the moneys needed for the project. The project money will always be in the Government's account and will never leave. The loan amount we have been tentatively approved for is 50 Million USD. The loan and the program, of course, will only take place if the Government approves all the terms and conditions of the loan and the program. We think it will be a good thing for the Government to keep 15 million USD out of the trade to get the projects started, and put the rest into the collateralized-trading program to receive the weekly payouts needed for the projects. The remainder of the profits of the trade after paying the Government will be to repay the loan to the bank whereas in the end this project will cost the Government nothing.

We are willing to come back to Tobago and work with you in order to try and put this whole thing together. But before we come, we would appreciate it if you could appoint our company as your consultant/agent. This does not commit the Government to anything. You do not have to pay us

anything if the loan does not go though [sic]. If you decide you do not wish to take the loan and participate in the trading program, then the appointment becomes null and void.

If you decide to enter into our arrangement, all of our commissions will be paid without affecting the 50 million USD. going into the projects. Before I can send you the letter from our bank, we have to have some kind of consultant and or agent appointment from you. We also need the appointment in order to be able to bring an example of the bond we will arrange for you. I will also come over to Tobago and work directly with you and, if necessary, have the necessary group come and meet you so you can make up your mind if you wish to proceed. If you wish to use land as your collateral for the loan, we will need to make a list of the kind of land you wish to pledge for the approval of the insurance company. The fidelity bond cost of 250,000 USD. will initially be put up by our group.

We have worked hard to try and come up with a scenario that will help THA achieve the funding they need for the projects listed in the most protected way possible, without the Government having to worry about the payback of the moneys.

Appendix H

Please let us know if you wish to pursue this matter. We look forward to visiting your country again. Once we have received the consultant appointment, I will arrange to travel to Tobago to bring you everything I can for your review and to help you put this together hopefully for a final approval by THA.

With Kindest Regards,

s/ Laura Lee Sorsby

APPENDIX I — LETTER FROM L. SORSBY DATED MARCH 18, 1999

CAN-AM INTERNATIONAL L.L.C.
2530 TOWHALL [sic] LANE
KATY, TEXAS
77449

TELEPHONE: 281-347-0685
E-MAIL: *LALAG64080@aol.com*

March 18, 1999

Attention: Chief Administrator
Tobago House of Assembly

From: Laura Lee Sorsby
Financial Consultant
Tobago House of Assembly

Subject: Trading Program Recommendation

Dear Sir:

I have reviewed the enclosed contract from United States Holdings with Mr. Hugh Hague of Global Strategies Inc. Mr. Hague had submitted two trading groups for THA's review and consideration. Over the past two days we have had time to review both trading groups in depth and I am now in a position to offer you my recommendation. Based on all the information that I have gathered from my own sources, I feel that it's in the best interest of the Tobago House of Assembly to go with Bower Cotton. Mr. Hague and I have been working with this group for two years. We know they have an

outstanding reputation in London, England, and have been in business since 1818.

The potential returns offered by United States Holdings on an investment of (10 million USD), using a CD program that I am not familiar with seemed unrealistic. I explained at my first meeting with you, I had never seen this CD program, therefore, I wanted to see the document Mr. Matz represented. We were under the impression that this had been closed, which has proved not to be the case. Therefore, I have concluded I can not recommend this company or the C.D. program to you.

The key reasons for selecting Bower Cotton are as follows:

a. Through this type of trading program, as soon as THA qualifies for entry into the Federal Reserve program ($100,000,000.00 Million USD) a Federal ID number will be given insuring THA a position in the trading program.

b. The payment is guaranteed by the participating bank. The location of the bank is Switzerland. The bank will issue the payorders in the name of THA or the name submitted by the government.

c. THA will have its own account established in Switzerland, which will provide full protection of THA's principal. The money deposited will not leave the account of THA.

d. All transaction [sic] will be monitored by the federal reserve. In the event that the existing government administration was to change, the new administration will still be the beneficiaries of the trading program.

I trust this will meet with your approval. We sincerely appreciate all your time you have given to us while we have been here, and we look forward to a successful conclusion of your projects.

Kindest regards,

s/ Laura Lee Sorsby
Laura Lee Sorsby

APPENDIX J — MEMORANDUM OF UNDERSTANDING DATED MARCH 27, 1999

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (herein referred to as the "**MOU**") dated the 27th day of March in the Year of Our Lord One thousand Nine Hundred and ninety-nine, by and between:

PARTY OF THE FIRST PART:

The **TOBAGO HOUSE OF ASSEMBLY**, whose address for the purpose of this **MOU** is 1 Jerningham Street, Scarborough Tobago (Herein referred to as "**THA**").

And

Laura Lee Sorsby, CEO of **CAN-AM INTERNATIONAL L.L.C.**, a limited liability company organized under the laws of the State of Texas, USA, which address for the purpose of this MOU is Laura Lee Sorsby, 2425 Townhall Lane, Katy, Texas, U.S.A. 77449 (hereinafter referred to as "the Financial Consultant", (CEO of CAN-AM).

RECITALS:

Whereas, the Financial Consultant, has certain expertise in financing and coordinating of government projects, and

Appendix J

Whereas THA is considering for financing the following critical development projects outlined in the Tobago Development Plan to consist of, but not limited to:

- THE SOUTHWEST WASTE – WATER TREATMENT PLANT
- THE BELMONT ROAD – HIGHWAY
- THE RICHMOND WATER SUPPLY AND TREATMENT FACILITIES:
  and

WHEREAS, THA has appointed, the Financial Consultant, as the financial consultant for the projects, with the authority and responsibility to oversee the financing process on behalf of the Assembly, and

WHEREAS, the parties anticipate a productive relationship and desire to formalize their understanding of each party's obligations and benefits.

NOW THEREFORE, in consideration of the mutual benefits accruing hereunder and the mutual covenants contained herein, the Parties agree as follows:

I. RESPONSIBILITIES OF THA'S CONSULTANT LAURA LEE SORSBY

1.0 In connection with the appointment dated 22nd February, 1999, appointing Ms. Laura Lee Sorsby, CEO of CAN-AM, as financial consultant for the

projects named, but not limited to, the authority and responsibility to oversee the financing process for the named projects, which responsibilities include the following:

a. Introducing different financing structures to THA for government review and selection.

b. Arranging the funding institution, for financing and placement of accounts, subject to THA approval.

c. Providing contractual arrangements with programme managers of trading groups acceptable to the THA showing the traders ability to create this type financing.

d. Negotiating, subject to the approval of THA, the interest rates payable on the funds held in the Government's account if THA pledges or blocks funds for the program selected to finance the identified projects.

e. Arranging for the profits generated by the financing program to go into a THA trust account for the payment of expenses related to the financing and for disbursements to the named projects acting as paymasters on upon [sic] approval of the THA.

f. Working with THA to arrange collateral, if required, for the financing program selected by THA.

g. In the event of conventional financing, arranging the lowest interest rates available on behalf of the THA for it's [sic] selection and approval, taking into consideration all the terms of the loan.

h. Working jointly with THA for coordinating the identified projects for financing and for disbursing the funds for infrastructure projects.

i. Working jointly with THA selecting construction firms and taking bids that will be submitted to THA.

These responsibilities shall be performed subject to the conditions that:

1.1 All matters that require financial commitments by the THA shall be brought to the notice of the THA for agreement before any final commitments are made.

1.2 All schedules of payments and money management shall be determined and pursued only with the agreement of the THA, but the THA shall retain an open book policy with the Consultant.

1.3 The Financial Consultant or an appropriately identified and appointed agent of CAN-AM shall be available to the THA, or its appointed agents, at all times.

1.4 The agency appointment will remain in effect from the time trading begins or as long as THA is receiving

funds through any trading programs of [sic] financial arrangements provided by the Financial Consultant or through any Clients introduced by Consultant.

1.5 This agency appointment can only be revoked in writing if the Financial Consultant fails to perform on the terms of this MOU.

II. RESPONSIBILITIES OF THA

2.0 In order to facilitate the efforts of the Financial Consultant in arranging financing for the named projects, the THA agrees as follows:

a. To provide the most feasible and high priority projects for financing.

b. To get all necessary government approvals as requested by the Financial Consultant in order to implement the financing program selected by THA from those submitted by the Financial Consultant.

c. To execute all documents necessary to implement and carryout the selected financing program; including but not limited to, bank and trading agreements and all necessary pay orders to be signed by government officials and lodged with the Trustee at the Trading Bank or other financial institution at the signing of the contract and before trading commences.

d. THA will arrange all necessary government collateral as required to implement the selected financial program.

III. JOINT RESPONSIBILITIES

3.0 The parties agree that: If required, the Financial Consultant and THA will travel together to make the appropriate banking arrangements in order for THA to enter into the trading program.

a. The Financial Consultant and THA will jointly oversee the construction of the projects with the funding provided through the Financial Consultant's efforts. The THA and Consultant will act as JOINT PROJECT COORDINATOR.

b. An appointed Trustee of the Trading Bank (Trustee) will preside over THA Trust Account or Accounts containing the profits generated from private placement or other funding programs. A minimum of two signatures from the government shall be needed for disbursements. THA will allow the Financial Consultant to oversee disbursement with THA and the Financial Consultant will be allowed to review the account and returns jointly with THA.

IV. FEE AGREEMENT

4.1 For the services of financial consultant. THA agrees to pay the Financial Consultant a fee equal to ten

percent (10%) of all monies earned from the private placement (or other funding programs) out of funds provided to THA generated by the funding program arranged by the Financial Consultant. This fee is to be paid directly to the Financial Consultant by the Trustee. The Trustee will then disburse profits of the private placement (or other funding programs) as the profits are realized, that is, on an approximately weekly basis or any time THA has disbursed any funds from the trade or loans. THA agrees to cooperate with the Financial Consultant in executing all documents required by the Trading Bank or other financial institutions to disburse the said fee to the Financial Consultant as agreed above. THA agrees to file a properly executed fee agreement and/or pay order authorizing payment of the said fee to the Financial Consultant. This authorized payment will be lodged with the Trading Bank or Trustee or another financial institution, prior to the funding or trading program is initiated, or a contract has been signed by THA entering THA into the program.

4.2 The Financial Consultant may charge a fee, to be approved by THA, for the services as project Coordinator. Such fee is to be negotiated for each project and based on the complexity of the project and the services to be *pre*formed [sic] by the Financial Consultant.

4.3 In the event that THA selects a form of conventional financing from the financing structures submitted by the Financial Consultant, the parties shall negotiate

prior to the closing of the conventional financing a fee agreeable to both parties to compensate the Financial Consultant for the services in arranging such financing. The fee to be payable upon closing.

V. CONFIDENTIALITY

5.1 Each of the parties agree to protect and not disclose, either directly or indirectly the Confidential and Proprietary Information disclosed by the other party without the prior express written consent of the furnishing party. For the purpose of the MOU "Confidential and Proprietary information" shall include, but to [sic] be limited to, any and all business-related disclosures made by each to the other. Whether such disclosures are made directly or indirectly, including business methods, financial assets, financing sources, individuals and /or private and government entities disclosed, introduced, or made known to, any of the parties by any other party, and shall include telephone numbers, addresses, telex, fax numbers, "e-mail" address, et al [sic] disclosed to a party by another party hereto. The parties will not in any manner make, solicit or accept any business from sources, individuals, and private and governmental entities made known to them by or through another party hereto without express, written permission if the party who disclosed, introduces or made known said source, individual, and entity.

5.2 This Confidentiality agreement does not apply to those companies, individuals, entities, and/or trusts,

with which any of the parties hereto have had, or continue to have confirmed, verifiable, independently established business relations which predate this MOU. To establish such exclusion, verification of said relationship(s) and date(s) thereof must be presented in writing, and documented to the other party within thirty (30) days after said excluded party is revealed.

VI. DURATION

6.1 This MOU shall remain in effect as long as THA is receiving funds through any trading programs or financial arrangements provided by the Financial Consultant.

6.2 In any event the Financial Consultant shall continue to receive payments of the agreed fee of ten percent (10%) of all monies generated by funding programs, submitted by the Financial Consultant, and entered into by THA. This is up to and including the expiration date, of this MOU, as amended from time to time, so long as the said funding program is in effect and generating funds on behalf of THA.

VII. NOTICES

7.0 All notices to be given by a party under this MOU shall be either delivered personally or sent by prepaid airmail, facsimile or by e-mail to the address of the other party as shown below, which address may be modified from time to time by giving the other party written notices.

Appendix J

The Tobago House of Assembly
Attention: Hochoy Charles, Esq.
Address: 1 Jerningham Street,
Scarborough Tobago
Telephone: 1 868 639-2696
Facsimile: 1 868 639-5374
E-mail:

Can-Am International, L.L.C.
Attention: Laura Lee Sorsby
Address: 2530 Townhall
Katy, Texas 77449
Telephone: 681-347-0685
Facsimile: 403-547-4108
E-mail: LALAG64080

VIII. MISCELLANEOUS

8.1 This MOU and all amendments thereto shall be governed and constructed in accordance with the laws of the Republic of Trinidad and Tobago.

8.2 No supplement, modification or amendment of the MOU shall be binding unless executed in writing by the parties.

8.3 This MOU may not be assigned without the prior written approval of the parties.

Appendix J

IN WITNESS Whereof, authorized representatives of the parties hereto have executed this document as shown below.

THE TOBAGO HOUSE OF ASSEMBLY

By: s/ HCharles

FINANCIAL CONSULTANT FOR TOBAGO HOUSE OF ASSEMBLY

By: s/ Laura Lee Sorsby

APPENDIX K—LETTER FROM L. SORSBY DATED APRIL 12, 1999 (LETTER MISDATED AS MARCH 12, 1999)

CAN-AM INTERNATIONAL, L.L.C.
2530 Townhall Lane
Katy, Texas

Telephone: (281) 347-2308 **Fax: (713) 355-5721**

Attention: Honorable Chief Secretary
Tobago House of Assembly

From: Laura Lee Sorsby

Date: March 12, 1999

Subject: Bower Cotton/Nikea Trading program

Dear Honorable Sir:

It was a pleasure meeting with you and your staff in London. I really enjoyed learning more about your personal accomplishments in your country. I am very honored to have had the opportunity to work with you and your staff.

We have wonderful and timely news for the THA. Bower Cotton/Nikea have available at the present time US$ 100 million dollars [sic] of good clean funds. They have an investor they are placing into the program. Because of the investor's contract with Bower Cotton/Nikea, we are on a short time fuse.

Appendix K

We have only twenty banking days to get the THA into the program in order to "piggy back" THA onto the investor's US$100 million dollars per the investors contract at the bank. If we do not get into this contract with this available US$100 million dollars, we will have to wait for another available US$100 million to be able to "piggy back" your US$ 10 million dollars to generate the kind of profits we have discussed. This is the reason why the THA can receive the type of profits we prepared on the charts in our proposal.

The good news is instead of having to wait 6 to 8 weeks from the time the trading is started with the proof of funds, you now only have to wait approximately 3 to 4 weeks. Your proof of funds will have started generating profits. This is due to the fact the contract in place with the US$100 million dollar investor's contract is ready. That is why THA has to move to get everything qualified.

Please refer to the attach [sic] documents Bower Cotton/ Nikea have prepared for your review and signature. Remember our pay orders are generated through the trade, so if you do not go forward with the contract, these pay orders will be worthless. This will not affect your project profits either.

In summary here is [sic] the things needed:

1. Letter of Intent
2. Proof of Funds
3. Pay orders signed and notarized

Appendix K

We must have these things in order to get your contract issued from the bank for your review and approval. You have a little more time to get your budget together on what you will need to draw out of the profits as the trading is being generated.

In my opinion, I believe this group is the most qualified group out of all the other groups you met. There is absolutely no risk for the THA because your US$10 million stays in your own account and in your own control with absolutely no leans [sic] against the monies.

The offer from CMI is full of hidden cost and much risk in my opinion. I would not recommend this program even though it may work because of risk factors. I can only give my opinion, which is my job. The decision is completely up to you.

I am excited about the offer from Bower Cotton/Nikea and I am looking forward to seeing your government realize their dreams.

Chief Secretary, if you or any other Government official's [sic] need to speak to me, you can contact me at 281-347-0685 or you can fax me at (713) 355-5721. I await your response.

With warmest regards,

s/ Laura Lee Sorsby
Laura Lee Sorsby

APPENDIX L — LETTER FROM J. CLEAVINGER DATED APRIL 30, 1999

CAN-AM INTERNATIONAL, L.L.C.
5341 PAGEWOOD LANE
HOUSTON, TEXAS 77056

Phone: (281) 347-0685
(713) 623-4556
Facsimile: (713) 355-5721

To: Honorable Allan Richards, Chief Administrator
Tobago House of Assembly
FAX # 868-639-4151

From: Janice J. Cleavinger, General Counsel
Can-Am International L.L.C.

Date: April 30, 1999

Dear Allan:

Thank you for faxing the documents to us. In reading the letter of intent, we noted that you have included the bank account number for the designated funds and authorized the Programme Manager to verify the funds on deposit. If we understand your intent correctly, a proof of funds letter from your bank may not be necessary as Peter can contact your bank officer and do a bank-to-bank confirmation without further data.

If this is correct, we will let Peter know and he will proceed to contact your bank officer without the bank proof of funds letter, which could facilitate matters for you. Also, if this is

correct we will need a pay order endorsed as soon as possible with your same THA transaction code. As per our MOU, the contract can not be issued by the bank and nothing can go forward on the investment until all the documents, including the pay order, have been filed with the Programme Manager.

Sincerely,

s/ Janice Cleavinger
Janice Cleavinger

APPENDIX M — LETTER FROM R. WYATT DATED MAY 11, 1999

NIKEA
U.K. Administration Office
36 Whitefriars Street Tele: ++(0) 171 353 3040
London Fax: ++(0) 171 583 2869
England Telex: 28778 DX 94 London
EC4Y 8BH Email: gbbcbjgwv@ibmmail

BY FAX ONLY: 001 868 639 4151 **3 PAGES**

STRICTLY PRIVATE & CONFIDENTIAL

Mr Alan Richards
Tobago House Of Assembly
Tobago
West Indies

11th May 1999

Dear Mr Richards

RE: Private Placement Investment US$10.0 Million / Tobago.

Peter Newton has asked me to forward the attached letter, outlining the proposed basis for the Government of Tobago to enter a Trading Programme identified by Peter available in the next few days.

Appendix M

When I met you in London last month, I understood from the Chief Secretary and you that you had three specific requirements for any private investment, namely:-

1) Security of your capital at all times.

2) Profits paid weekly to ensure cash flow for government expenditure is maintained at all times.

3) The capital investment funds (US$10.0 } would generate substantial funds to assist in starting the capital projects identified.

I am sure you will agree that the trading opportunity on offer, as arranged by Peter Newton and Paul Simms, clearly satisfies all the criteria laid down by you.

I look forward to this matter now being completed successfully.

Kind regards

Yours sincerely

s/ R. Wyatt
Roger F Wyatt FRICS
For and on behalf of Nikea N.V c.c. P. Newton.

Appendix M

BY FAX ONLY : 001 868 639 4151 2 PAGES

STRICTLY PRIVATE & CONFIDENTIAL

Mr Alan Richards
Tobago House Of Assembly
Tobago
West Indies

11th May 1999

Dear Mr Riehards

RE: Private Placement Investment US$10.0 Million / Tobago.

Further to our telephone discussions today I would confirm that arrangements are currently in hand to introduce Tobago to a private placement opportunity, available over the next two to three days.

I apologise for the short notice, however trading tends to take place with very short notice to the investor and therefore we always try to have the application ready with all the necessary documentation completed at the earliest possible date.

The current trading opportunity requires applications to be submitted with all relavent [sic] documentation by **Tuesday / Wednesday, the 12th/13th May** and therefore, I require as a matter of urgency your confirmation of the following:-

1) A copy of the bank statement for the US$10.0 Million on deposit, signed by a bank officer.

2) Confirmation that Chief Secretary, Hochoy Charles and your good self will be available to travel to New York for a meeting at the bank on either Thursday of [sic] Friday this week.

The evidence of funds as in "1" above is required by return.

A meeting in New York has been arranged for you, and a full itinerary will be forwarded to you by Wednesday evening, to complete the following:-

a) Meet with the Administrator for the Trading Group to finalise and sign the contract relating to the trading programme.

b) The Administrator will arrange for the Chief Secretary and you to attend a major US Bank in New York to open a new bank account in the name of the Government. The exact details and location of the aforementioned bank will be given to you on your arrival in New York.

The new bank account, on being opened, will receive the US$10.0 Million transferred at the Investor's authority from the current bank holding the funds.

THE FUNDS, ONCE DEPOSITED IN THIS NEW ACCOUNT, WILL STAY ON DEPOSIT AT ALL TIMES AND BE "RESERVED" FOR THE DURATION OF THE TRADING CONTRACT AND BE UNDER THE CONTROL OF THE

Appendix M

GOVERNMENT SIGNATORY FOR THE ACCOUNT. AT ALL TIMES THE FUNDS CAN ONLY BE MOVED AT THE SOLE WRITTEN AUTHORISATION / REQUEST OF THE GOVERNMENT SIGNATORY AND FOR NO OTHER REASON WHATSOEVER.

In addition to the appointed Tobago Government Officer, two of the Trading Officers will be added as signatories to the account to facilitate the mechanics of the trading operations, however their powers are limited and they are not mandated or authorised to move the funds at any time without the specific authority of the Government Officer as described above.

The meeting arranged at the bank will be for *The Chief Secretary and yourself only* to meet with the Trader/ Administrator and to maintain the necessary confidentiality between the Investor and the Trader. **No other persons are invited to attend these meetings.**

Once the above steps have been satisfatorily [sic] accomplished then it has been indicated by the trader that trading will commence on or about Tuesday, 18th May.

We are also advised that the profits resulting from this particular trading contract will be paid out on a weekly basis and will be approximately **50% return on capital invested per week**.

Appendix M

The length of the trading can never be positively quoted, however previous similar trades have been for a minimum period of **16 weeks** and we are advised we can anticipate a similar period.

I trust you will appreciate this is an excellent opportunity for you and therefore look forward to receiving your confirmation that arrangements can be made to accommodate the timetable outlined above.

Please contact me should you have any queries at this time.

I look forward to hearing from you as soon as possible, and for total confidentiality please contact me at all times on **TELE / FAX NO: 0044 1590 643794 with regard to any matter relating to this transaction.**

Kind regards

Yours sincerely

s/ P.Newton
P.Newton

APPENDIX N — LETTER FROM L. SORSBY DATED MAY 11, 1999

CAN-AM INTERNATIONAL, L.L.C.
5341 Pagewood Lane
Houston, Texas 77056

Phone: (281) 347-0685
(713) 623-4556
Facsimile: (713) 355-5721

Attention: Honorable Chief Administrator
Mr. Alan Richards
Tobago House of Assembly

From: Laura Lee Sorsby
CEO
Can-Am International L.L.C.

Date: May 11, 1999 (Second Fax)

PLEASE DELIVER AS SOON AS POSSIBLE

Dear Allan,

I have spoken again to Peter Newton. The Chief Secretary must be in New York City on Thursday to meet with the Federal Reserve. You will probably have to leave Tobago Wednesday. The bank statement confirming proof of funds needs to be sent to Peter today if at all possible, tomorrow at the absolute latest as it must be filed with the Federal Reserve before you can go in. Allan, these programs do not come available very often. We have gotten you in, but you must move on it or lose the opportunity.

Appendix N

I will sign the pay order confirmation and will be getting the pay order with bank information back to you soon.

PS Please call Peter Newton back. You were on the phone when he tried to reach you just now.

Laura

APPENDIX O — LETTER FROM H. HAGUE DATED MAY 14, 1999

CAN-AM INTERNATIONAL LLC
2530 Town Hall Lane
Katy, Texas, USA, 77449

Phone: 281-[illegible] (USA) Fax: 713-355-5721 (USA)
403-[illegible] (CAN) [illegible] (CAN)

Please Deliver To The Honorable Allan Richards Immediately. Thank you.

May 14, 1999

Honorable Allan Richards
Chief Administrator
Tobago House of Assembly
1 Jerningham Street, Scarborough
Tobago, WI

Dear Honorable Allan Richards,

Re: Proof of Funds

The purpose of this letter is to advise you that if you receive your Bank Statement today or Monday, please fax it directly to Peter Newton's home [illegible] -1590-643-794. He will be working through the week-end at home in order to process the paper work that he has to prepare for New York. You and Mr. Charles will need to be in New York Tuesday morning. Peter will confirm this as soon as he receives your Proof of Funds.

Appendix O

I understand Laura has provided you with the most [illegible] I received from London this morning. I feel this is a blessing from on high. Our [illegible] came as a results [sic] of a very large transaction being done which required a couple of extra days for processing. I hope that this [illegible] some help to you. Would you please confirm with Laura or myself when you [illegible].

Thank you.

Sincerely,
s/ Hugh Hague
Hugh Hague
Director

Appendix O

Mr. Newman see attachment

May 14, 1999 – Please deliver to Hon. Allan Richards

Re-written content no longer legible

Mr. Newman.- This was sent after Peter did a bank to bank confirmation and the funds were not there although, Tobago was still stating the [sic] would have the funds shortly.

May 14, 1999

Honorable Allan Richards:

Proof of Funds

The purpose of this letter is to advise you that if you receive your bank statement today or Monday, please fax it directly to Peter Newtons [sic] home. He will be working through the weekend at home in order to process the paperwork that he has to prepare for New York. You and Mr. Charles will need to be in New York Tuesday morning. Peter [will] confirm this as soon as he receives the proof of funds.

I understand Laura has provided the most recent news I received from London this morning. I feel this is a blessing from on high. Our break came as the results [sic] of a very large transaction being done which required a couple of extra days for processing. I hope this will be of some help to you. Would you please confirm with Laura or myself when you have sent the paperwork to London. Thank you. Sincerely Hugh Hague

APPENDIX P — LETTER FROM H.HAGUE DATED JUNE 6, 1999

CAN-AM INTERNATIONAL LLC
2530 Town Hall Lane
Katy, Texas, USA, 77449

Phone: 281-347-0685 (USA) Fax: 713-355-5721 (USA)
403-208-8708 (CAN) 403-547-4108 (CAN)

IMPORTANT - PLEASE DELIVER TO THE CHIEF ADMINISTRATOR THANK YOU.

Date: June 6, 1999 - Pages sent: 2

To: Honorable Allan Richards
Chief Administrator
Tobago House of Assembly
1 Jerningham Street, Scarborough
Tobago, WI

Dear Honorable Allan Richards,

In speaking to Roger Wyatt, who you met in London, he informed me that there is some good news and some not so good. The good news is that there will be another program starting the week of June 14, 1999. There are no specifics at this time but indications are that the program will be very similar to the first one that THA was wanting to enter. The not so good news is that key people involved with this Private Placement are preparing to leave for summer vacation starting July 1, 1999. This means that it will be critical that THA's money be in trading position before people leave for holidays.

If this cannot be done, THA will have to wait until September before trying to enter another program.

Laura informed me Friday that THA will have their money on June 15, 1999. Based on this THA will need to do the following:

1. Prepare the same set of documents (with the current date) that had been previously submitted to Peter.

2. Provide Peter with a copy of THA's bank statement. I would recommend that you reserve the $10 million immediately.

3. When #1 and #2 are complete (with the appropriate signatures), forward them to Peter Newton via fax (to his resident [sic]).

4. Due to the small window of time that will be available between June 14 and July 1, 1999, Peter must receive and verify your funds. Following this you and the Chief Secretary will be required to be in New York within two to three days. Timing will be extremely critical if you are to enter this program before July 1, 1999.

If the above can be accomplished, and assuming that the program is similar to the first one, THA should have their original investment back into it's [sic] coffers within three weeks and a very good cash flow to follow on a weekly basis. If THA cannot meet this critical time frame please let Laura or myself know immediately.

Appendix P

Thank you for your cooperation and your sincerity in trying to make this plan a reality for THA.

Sincerely,
s/ Hugh Hague
Hugh Hague
Director

cc. Laura Lee Sorsby
Peter Newton

APPENDIX Q — EMAIL FROM L. SORSBY DATED JULY 11, 1999

Subj: Trading programs
Date: 7/11/99 10:03:06 PM Pacific Daylight Time
From: LALAG64080
Re: dumasrennie@hotmail.com

Dear Rennie,

I have some good news. I have another trading program available. The entry to this program is 20 to 100 million USD.

What we need to get the client into the program is a letter on the client's banks [sic] letterhead addressed to the client stating the client has _____ USD. of good, clean funds in their account. This letter needs to be signed by two bank officers, and the bank needs to be a top 100 World bank.

The next thing we will need is a letter of intent from the client stating the client wishes to enter into the high return trading program providing the terms and conditions are acceptable to the client and to the cleint's [sic] legal council [sic] and financial consultant/agent. This needs to be signed by the client and the controller of the funds. We will also need for the letter [to] include the type of projects the client wishes to fund with the the [sic] monies created by this program.

Rennie, as I explained to you, I cannot afford to keep giving away my services and educating these people. I am in the red due to phone bill, travel expenses, as well as the time I put into putting together the proposal for THA, the many months I search for programs for THA, and the time I spent

in Tobago and London, as well as the time and monies I spent after the trip to London due to the fact THA commited to me they had every intention to move forward, and went so far as to issue a payorder, but when time came for them to prove funds and go to the bank, I did not receive as much as a phone call. I incurred a lot of cost, and as in Charles case, the letter he prepared and the payorder meant nothing since they did not go forward.

[illegible] them other funding opportunities, ie., the bond issue, but they told me they only wanted the trading program, and that is why I was willing to go forward without a contract, but I can no longer be so trustworthy.

I have a new bond issue program which has been passed by the legislatue [sic] here and it offers way to fund government projects as well as education projects. It will take about a year to get it in place, because we will have a lot of work to do getting an underwriter, and preparing the proper legislature to get this type of bond issue strucutre [sic] passed in the counties we will be working. We will also have to get the bonds sold which shoud [sic] be no problem becuase [sic] of the underwriter. The difference is in this bond issue strucutre [sic], there will be no risk and no dept [sic] for the government or client once we have structured this deal and the legislature has been [sic] passed it. The University can use this as well for their projects.

Now, as far as the Uniiversity [sic] is concerned, if they are serious about learning about all the funding type structures and bond issues I can help them structure, I think they sould [sic] be willing to put me on a one month retainer for 6,000.

USD. plus travel expenses. For this retainer, they will be able to meet me, appoint our company the agent to handle putting together a funding proposal for them, including the trading program information, as well as the no risk, no dept [sic] bond issue sturcture [sic] for them. If the client wishes to pursue the trading program or the bond issue, the consulting fee will rollover for the trading program until trading commences. As far as the bond issue goes, the fee will be 6,000. USD. a month until the budget for the year is submitted by myself and the company that will be assiting [sic] us, if they wish to pursue this type structure.

But to get the ball rolling, they will need to retain my services for a one month contract plus travel expenses. If the client decided not to go forward after I have put together the proposals for them, the contract will be null and void, but if the client wishes to pursue any of the avenues I have, another contract will be put in place and the fee will automatically roll over. If the University is serious, I think they can retain us for one month in order for us to come over and educate them.

Ronnie, if you can get them to agree to this one month retainer, with a possible rollover contract if they pursue any of the business I introduce and strucure [sic] for them, I will give you 1,000. USD. per month for every month they pay. If they decide to go for the bond issue, I will submit a budget for the year for our company, as well as the company assisting us, and at that time your fee will go up. I may be able to bring you up to a monthly fee of 3,000. USD. depending on whether the cleint [sic] accepts the budget I submit. I will have to figure out how much I think we [illegible] charge.

Appendix Q

As far as the trading program goes, I will charge 6,000 USD. a month until the funds start to trade, plus travel expenses. I will only be able to give you 1,000 USD. out of this fee per month until the trade starts, because I will not be able to submit a budget like I will be able to do with the bond issue. We will be paid a fee at the closing of each project by the clients doing the bond issue, and I will be willing to give you a commission out of that fee for every project financed by the bond issue after I have paid the others involved with us. Out of the monies my company make [sic] for the trade, and after all commission and cost have been paid, I will give you a percentage of the overall monies my companies make on the trade to be decided once we know how much the client wishes to invest.

Please work on the University this week. I would like to tell you the Unganda [sic] government is pursueing [sic] my services. I did not want to commit to them if I got Trinidad and Tobago going, but if we do not get something going, I will have to commit to them. I feel if I give my best it is better to work with only one government at a time because of all tha [sic] is involved.

I await to hear from you. By the way, Kirt never e-mailed the project information. Do you know why?

Take care and behave yourself in Japan.

Kindest Regards,

Laura

Appendix Q

The difference in this program is the client can bring me and their legal council [sic] to the bank for review of the contract. The attorney will be allowed to take the contract and study the contract. If the contract is acceptable to everyone concerned, only then will we go forward. Rennie, the LOI and proof of funds does not commit the client to anything. This is what we need to get the contract for the review of the client. If we do not like the terms and conditions of the contract, we do not sign and walk out. If the client really has the capability to prove the funds, their [sic] should not be any problem. This does not commit them, it just shows all parties concerned they have the ability to go forward if everything is satisfactory. The bak [sic] will not give this information to any client without qualifing [sic] the client.

APPENDIX R — LETTER FROM L. SORSBY DATED MARCH 7, 2000

Can-Am International L.L.C.
1707 Earl of Dunmore
Katy, Texas 77449

Telephone: (281) 347-2308
Fax: (713)

March 7th, 2000

Attention: Honorable Hochoy Charles
Chief Administrator
Tobago House of Assembly

From: Laura Lee Sorbsy [sic]
Can-Am International L.L.C.

Dear Hon. Charles,

I am quite upset you have not answered my faxes or telephone calls. Per our last conversation, you promised me you were going to issue an invitation for me to bring Raymond James and Frankwell Investments over for discussion. Charles, I am loosing [sic] face with these people. After our meeting with Gee and Jenson, you said at that meeting you were definitely interested to move forward on how the bond issues are done and need more instructions on how this could be done. You ask us to bring the Investment Banking firm over that would be interested in doing the bond issues for Tobago. I contacted Raymond James at that point, and they agreed to come to see you for further discussions. I

am now getting embarrassed by not receiving a response from you. This company will never take me serious again if you do not respond as I requested. I have always tried to get you what you need, lawyers, funding etc., and have not ever charged you a dime. All I am asking is for you to meet with the people as you promised. This does not commit you to anything. If you do not meet with these two groups, I will have lost face with them, and they will refuse to do any more business with Can-Am. It will damage the reputation of my company. Charles, companies like Raymond James and Frankwell do not do business with everyone. They are able to be selective. I have gone out of my way to convince them to consider funding Tobago, without needing the involvement of the Central Government. The meetings do not bind you to their proposal, but at least it gives me the respect to let them come and table their proposal. It cost you nothing but your word to me you will issue the invitations.

I am sorry I have had to ask this way, but my reputations [sic] on the line. Please call me for discussions about this matter, or please issue the two invitations per our discussions. I have to meet with some people in Trinidad, but I am waiting your invitation so I may make all the meetings on the same trip. I realize you are very busy and your time is valuable, but so is mine. I have valued my friendship with you. I hope you have valued mine. Please respond to me.

Kindest regards,

/s/ Laura Lee Sorsby
Laura Lee Sorsby

Cc: Mr. Alan Richards

APPENDIX S – EXCERPTS FROM DEPOSITION OF LAURA LEE SORSBY, VOLUMES I, II, AND III TAKEN APRIL 1 - 2, 2003, AND NOVEMBER 19, 2003

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Q. And who was the program manager —

A. Peter Newton.

Q. — who was going to be probing the account?

A. Peter Newton.

Q. And I am just going to end with this and we will continue tomorrow morning. Are you aware of any Federal investigation into prime bank investment investments?

A. Uh-huh. Yes. I am aware of some investigations for some programs, yes.

Q. Are you aware of a program similar to the one that you had recommended to THA?

A. I have known some that are similar but not the same.

Q. And would you agree that some of the following similarities are shown with respect to yours?

A. Uh-huh.

Q. The concept of secret trading, would you agree with that?

Appendix S

A. Secret trading, it is not a secret; it is that it is between the bank and the client. The trading is not a secret.

Q. Would you agree that risk free is something that comes up quite often?

A. Yes. That's true.

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Q. Would you agree that the use of the words "guaranteed" and "high rates of return" are often utilized?

A. Uh-huh.

Q. Would you agree that the terms "investments only used as collateral" is something similar to this particular investment?

A. Investments only used as collateral?

Q. Right.

A. No.

Q. No, you wouldn't? Okay. Would you agree that — and we will go through this — probably page by page tomorrow, some of the documents — but would you agree that many of the documents that have been presented by Nikea had typographical errors in them, grammatical errors in them?

A. I know that they presented them a format and THA retyped them, and I think that's where the typographical errors came in.

Q. Oh. Who prepared the nondisclosure, non-circumvention clauses, do you know?

A. Bower Cotton.

Q. What about the confidentiality agreement?

A. Bower Cotton.

Q. The non-solicitation agreement?

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A. Came from Bower Cotton.

Q. The letter of intent?

A. Sent from Bower Cotton.

Q. The proof of funds document?

A. I think that was a document that Charles had to prepare and submit to Peter Newton.

Q. Right. But who asked him to prepare it?

Appendix S

A. Charles told them he wanted to enter the program, so they told him that he had to prepare these documents.

Q. And who told THA that they needed proof of good, clean, clear funds of non-criminal origin?

A. That's required —

Q. By whom?

A. — by the — Peter Newton, and any bank would want to find that out, also. Anytime you go into a banking transaction, they want to know where the funds came from, if it was clean, clear. I know that because I have some other banking transactions that have nothing to do with trading programs and they always want to know where the money came from.

Q. Do you know what I just read from?

A. Yes. I have seen it.

Q. I read from a press release from the FBI —

A. Uh-huh.

Q. — that was issued just a couple of weeks ago.

A. Uh-huh.

Q. And I read a section that relates to: Potential investors are encouraged to watch out for PBIF red flags, investment opportunities that have one or more of the following characteristics.

A. Uh-huh. I have read this before.

Q. And you just agreed that on one, two, three, four, five, six, seven, eight — 11 of the 12 characteristics —

A. Uh-huh.

Q. — are evidenced in the transaction that you had recommended to Tobago?

MS. PARROTT: I am going to object that's argumentative and a misstatement of her prior testimony. She hasn't been given the document. She hasn't agreed to all that. She has agreed with some assertions you made generally. So I will object and I will instruct her not to answer that.

MR. LEPORE: We will mark that.

(Exhibit 33 marked.)

Q. (BY MR. LEPORE) What's that been marked as?

A. Thirty-three.

Q. Okay. I want you to now, in view of your counsel's objection, instruction — which I don't agree. . . .

* * * *

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Q. Is there any reference to Nikea on this?

A. No.

Q. So, your recommendation to Tobago is, in part, based on your recommendation your representation that Bower Cotton has an outstanding reputation in London, England and has been in business since 1818; is that correct?

A. That's what my attorneys gathered on the information that they acquired, yes.

Q. It says, "Based on all the information that I have gathered from my own sources." Do you see that?

A. Yes. My attorneys were my sources.

Q. Oh, okay. You didn't actually do any of the information gathering yourself, did you?

A. No. The attorneys did it. They were gathering it for me.

Q. And did your attorneys explain to you that Bower Cotton was a law firm and not an investment house?

A. My attorneys, yes, they did explain it was a law firm.

Q. Okay. And do you have any explanation in here that Bower Cotton is a law firm and not an investment house?

A. Not in that letter. I didn't ever say it was an investment house.

* * *

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A. When we first approached them, we approached them with the same proposal that the government was going to give the guarantee and then we had to retract.

Q. All right. So, when did the government when did ICT and Mr. Mohammadi become interested again in this proposal?

A. When I told him that there was an opportunity to put it into a trade and he required ten percent be placed up of the amount that was being required by him by the THA, to be proven that they believed in their own projects.

Q. When was that that you spoke to him and that's what he told you?

A. That was prior to going to London.

Q. Was it before March 18th of 1999 when you wrote this letter?

A. Yes.

Q. So where in this letter does it reference a $10 million investment?

A. It doesn't in this letter. It references the hundred million.

Q. Part B of this Exhibit 43 says, "The payment is guaranteed by the participating bank. The location of the bank is Switzerland. The bank will issue the pay orders in the name of THA or the name submitted by the

government." Do you see that?

A. Uh huh.

Q. "Yes"?

A. Yes, sir.

Q. Where did you learn about the payment being guaranteed by the participating bank?

A. From Mr. Newton. All the information I had was through Mr. Newton.

Q. Which bank in Switzerland was going to be the bank?

A. He didn't identify the name of the bank, which one it was. He didn't say. He just said in Switzerland.

Q. Why was Switzerland chosen, do you know?

A. I have no idea.

Q. Did you ask?

A. No.

Q. Did you do any due diligence on this proposal beyond relying on what Mr. Newton told you?

A. I knew I asked for some information and I was advised along with Hochoy Charles that the only way to get the information is to prove the funds and go to the bank that is going to trade.

Q. Did that raise any suspicion in your mind that they wouldn't give you the details of the transaction . . . .

* * *

need for them to get involved with the people at Bower Cotton because you had —

A. No.

Q. — another opportunity?

A. The opportunity that I had would be with the Bower Cotton program.

Q. Did you tell them to — anyone at Tobago in April of 1999 of another investor?

A. I told them I had a philanthropic investor.

Q. When?

A. Around that time.

Q. Ms. Sorsby, in April of 1999 — let's focus for a minute, four years ago — did you tell anyone in Tobago about a philanthropic investor?

A. Yes.

Q. When did you tell someone in Tobago about this other investor?

A. I didn't say "other investor." I said "investor."

Q. What are you talking about now, Ms. Sorsby?

A. I am talking —

Q. The double-talk is starting to get to me.

MR. MOORE: Objection, argumentative. Object to the sidebar.

Q. (BY MR. LEPORE) Ms. Sorsby, April of 1999,

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you talked to Tobago about an investor; is that correct?

A. That there was an investor, yes.

Q. And who was that investor?

A. I didn't tell them who it was.

Q. Well, who was it?

A. It was Mohammad Mohammadi.

Q. Okay. In April of — April 12th of 1999, is there any reference to an investor beyond Bower Cotton/Nikea?

A. The program we were talking about was going to be with Bower Cotton/Nikea.

Q. Are you suggesting to me today under oath that the investor for the Bower/Nikea $100 million was Mohammad Mohammadi?

A. My investor was, yes.

Q. Ms. Sorsby, please. Are you suggesting that the investor for the Bower Cotton/Nikea proposal was Mohammad Mohammadi?

A. That's the investor I identified, yes.

Q. Where is that on this document?

A. It is not on the document. I was under a nondisclosure agreement with Mr. Mohammadi.

Q. Did Nikea/Bower Cotton know about the existence of Mr. Mohammadi?

A. Nikea knew. They knew that I had an investor.

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Q. So, when you sent this letter that is dated April 12th: You have wonderful and timely news from — for THA. Bower Cotton/Nikea have available at the present time $100 million dollars of good, clean funds. They have an investor they are placing into the program —

A. Uh-huh.

Q. — is that Mr. Mohammadi?

A. That was my investor, yes.

Q. No. The "they." It says they have an investor.

A. Yes.

Q. That apparently refers to Bower Cotton/Nikea. Is that who they had as an investor?

A. I had the investor. I represented it to Nikea and they were going to put it in the Bower Cotton program.

Q. Did Bower Cotton/Nikea in April 12th of 1999 have any investor other than your friend Mohammad Mohammadi?

A. I don't know.

Q. What were you referring to when you said they have an investor willing to put up the $100 million?

A. I was referring to the contract that was available at the time when Mr. Mohammadi was going to. . . .

* * *

(Recess taken.)

(Exhibits Nos. 54 through 58 marked.)

Q. (BY MR. LEPORE) Ms. Sorsby, do you know what an irrevocable pay order is?

A. I know I have seen it, yes. Yes, I have read it.

Q. What is an irrevocable payment order?

A. It was explained that it's a pay order to pay and it cannot be revoked.

Q. To pay what?

A. Commission.

Q. This document has been marked as Exhibit 54. What is that?

A. This is a pay order that was signed by Hochoy Charles made out to me.

Q. Made out to who?

A. My name.

Q. Where does it say that?

A. Well, disbursement account, Laura Lee Sorsby.

Q. You understand, then, that this irrevocable payment order is payment to you?

A. Yes.

Q. Of what?

A. This would payment for ten percent of the disbursable profits that would have been received

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through the trade.

Q. What is a tranche?

A. Tranche is a draw-down schedule.

Q. Was there an Appendix One?

A. This is Appendix One, the last page.

Q. And irrevocable payment order confirmation, Appendix One, disbursements account. What did you understand irrevocable payment order confirmation, Exhibit 54, to be?

A. A pay order that was irrevocable.

Q. But what did you understand it to do?

A. I understood it to be a commitment to pay.

Q. To pay what?

A. The commissions that were earned for my services.

Q. What commissions?

A. Commissions for the funding for the trading program.

Q. And the commissions were based on what?

A. There was commissions based on different – on trading profits.

Q. Did you understand that there was any obligation to pay you anything beyond commissions on profit?

A. Yes. There would have been commission paid . . . .

* * *

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recollection?

A. No, I don't.

Q. Exhibit 57 is another — is what?

A. 57 is another letter to Allan Richards.

Q. And this one also is from you?

A. Uh-huh.

Q. Do you have any recollection of sending this one?

A. Yes. I have a recollection of telling them they needed to be meeting in New York, after speaking with Mr. Newton.

Q. It indicates that this is a second fax of this date.

A. That's what it says there, "Second fax," yes.

Q. Okay. "The Chief Secretary must be in New York City on Thursday to meet with the Federal Reserve." Do you see that?

A. Yes.

Q. What did that mean?

A. Mr. Newton told us that he was going to meet them in New York and take them there.

Q. What was he going to do there?

A. Take them to the trade program.

Q. He was going to take them to the trade program. What do you mean by that?

* * *

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A. That was the instructions of the program manager.

Q. And then it says, "We are also advised that the profits resulting from this particular trading contract will be paid out on a weekly basis and will be approximately 50 percent return on capital invested per week." Do you see that?

A. Yes.

Q. Was that your understanding of the deal?

A. No.

Q. Oh. What was your understanding of the deal?

A. My understanding was 30 percent—

Q. Of what?

A. The profits. — would go to the THA project.

Q. What is this 50 percent return on capital per week?

A. I don't know.

Q. You have never seen this document?

A. I did not see this document, that I remember.

Q. Do you know any investments that generate 50 percent return weekly?

A. Do I know any? No.

Q. This is the investment that you recommended Tobago invest in, isn't it? This is the one —

A. I recommended that they invest in the program

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with Peter Newton, providing that their capital was in an account in their control that had a bank guarantee and —

Q. So, as you read this document, then, as you read this document, Exhibit 58, would you recommend that Tobago get involved in this document — this proposal?

A. No.

Q. And that's because —

A. Of the —

Q. — Tobago wouldn't have control, correct?

A. Correct.

Q. And because the promise of the 50 percent return on capital is impossible?

A. Yes.

Q. Any other reasons why you would recommend that Tobago not invest in this May 11th proposal as set forth in Exhibit 58?

A. Basically just the fact that the signatories on the account were not just theirs, I would not recommend it.

Q. Do you know if that meeting the following week happened in New York?

A. I don't think it happened, no.

Q. I am sorry, what?

A. As far as I know, no, it did not.

* * *

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the hundred million dollars that allegedly was going to form the basis for the investment?

A. I did not see the hundred million dollars, but he —

Q. Where did you understand that that hundred million dollars was coming from?

A. It was coming from a trust in Japan and they were — it was Mr. Mohammadi's trust.

Appendix S

Q. Your testimony today is that you introduced the Nikea group to Mr. Mohammadi; is that your testimony?

A. I gave information to the Nikea group that I had a philanthropist investor. That's my testimony.

Q. So your claim is that Mr. Mohammadi was the hundred-million-dollar investor in this deal?

A. Yes.

Q. Is there any document anywhere that shows that?

A. The reason that this wasn't submitted — yes, there is a document.

Q. And where is that document?

A. I will have to get a copy from Mr. Mohammadi.

Q. You don't have a document?

A. No.

Q. And it is your testimony that in April, May of. . . .

* * * *

Appendix S

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Q. Was different?

A. Yes, it was in Switzerland.

Q. And your proposal was?

A. Thirty percent a month.

Q. Thirty percent a month which is much more reasonable, right?

A. Better than 50 percent a week.

Q. Because 50 percent a week is unreasonable?

A. Based upon a 110-million-dollar investment, also.

Q. But 30 percent a month, that is only 360 percent a year; that's reasonable in a year?

A. Based on $110 million trading.

Q. Yes. So that's reasonable in your view?

A. Based — yes, sir, it is.

Q. Okay. It says in Paragraph 31 they have refused to pay you for your services, correct? Do you see that?

A. Paragraph 31?

Q. Right.

A. Yes.

Q. Okay. What is the value of your services?

A. Well, the value of my services for the Nikea proposal, in my opinion, is $10 million.

Q. Okay. Did you ever send them a bill for $10 . . . .

* * * *

APPENDIX T — EXCERPTS FROM CAN-AM'S ANSWERS TO INTERROGATORIES OF DEFENDANTS FILED SEPTEMBER 27, 2002

Interrogatory No. 8:

Describe in detail all efforts made by Can-Am to identify investment opportunities for TT or THA, including the names of any businesses or individuals contacted regarding TT or THA and the type of investments opportunities sought by Can-Am.

Answer:

Can-Am objects that this request is vague, overly broad, and abusive. Subject to its general and specific objections, Can-Am responds as follows:

It is not possible to describe in detail all efforts made by Can-Am to identify investment opportunities because of the voluminous nature of the efforts undertaken. Moreover, not all of the efforts undertaken are documented.

After meeting with the numerous representatives of T&T and the THA, Can-Am had a basic understanding of some of the needs and desires of the country. Accordingly, Can-Am began to seek various financing alternatives. After the appointment of the THA of Can-Am and Laura Lee Sorsby as agent to arrange financing, Ms. Sorsby contacted Global Strategies to assist. In 1998, Global Strategies approached their own financiers.

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Initially, the THA had represented to Mr. Hague and Ms. Sorsby they would secure a guarantee from the central government as collateral for the financing for their projects. Acting on that representation, Global Strategies and Can-Am sought funding proposals for conventional financing to be backed by a government guarantee. Mr. Hague and Mr. Gordon Roberts of Global Strategies traveled from Calgary Canada to Montreal Canada to meet with their bankers, such as the Bank of Montreal, after they received a letter of request for funding and project information form [sic] Alan Richards.

Ms. Sorsby of Can-Am contacted representatives of CitiBank in New York, and in particular Mr. Al Satalski, who assisted her in finding possible funders for the projects under consideration. In that regard, Ms. Sorsby contacted representatives of Raymond, James and Gee and Jenson. Raymond, James submitted a proposal to upgrade the Port of Trinidad. Moreover, Raymond, James participated in efforts to develop funding vehicles for the Projects, and for the ferry project.

However, the THA later informed Can-Am that it would not be able to secure a government guarantee to back any financing arranged. Accordingly, Can-Am had to start over and seek different types of financing. Can-Am reviewed and rejected many proposals, such as proposals from Lennox Investments, Cathay Consortium, Steven Vasak, and Jeffrey Matz. Eventually, Can-Am recommended the Bower Cotton/ Nikea Proposal.

After the THA backed out of the Bower Cotton/Nikea deal, Can-Am contacted OPIC (Overseas Private Investment

Corporation), an agency of the United States Government, and consulted with them to arrange for financing. However, THA never provided the necessary information to proceed with OPIC.

. . . .

Interrogatory No. 10:

Describe in detail the relationship between you, Can-Am and each of the following individuals and/or entities, including a description of any and all communications, negotiations or discussions between you, Can-Am and each individual and/or entity, as well as identifying the present status of the relationship:

. . . .

Answer:

. . . . Subject to its general and specific objections, Can-Am responds as follows:

a. Jeffrey Matz;

No relation to Can Am. This individual submitted a proposal directly to Alan Richards while Ms. Sorsby was in Trinidad with Mr. Hugh Hague. The proposal was rejected.

b. Hugh Hague and/or Gordon Roberts and/or Global Strategies, Inc.;

Financial consultants Can-am has worked and consulted with in the past. In addition, Mr. Hague is the representative for the Nikea Group in North America. Mr. Hague assisted in the effort to locate and review the Bower Cotton/Nikea Proposal. Further, Mr. Hague attended a meeting in London at which representatives of the THA were present.

c. Paul Simms and/or Bower Cotton;

Mr. Simms is a solicitor with the London firm of Bower, Cotton. He represented potential investors in the Bower Cotton/Nikea Proposal.

d. Peter Newton and/or Roger Wyatt and/or Nikea N.V.;

Peter Newton was to be the program manager for the fund to be created by the Bower Cotton/Nikea Proposal.

Roger Wyatt was introduced to Can-Am by Mr. Hague. In 1998, Mr. Wyatt was a surveyor for Nikea, an EPC consortium that was going to help construct the projects.

Nikea, N.V. was an engineering and construction company that was to help construct the projects.

e. Granadilla Investments Corporation;

Granadilla Investment Corporation was formed by Laura Lee Sorsby and incorporated by Janice Cleavinger. They formed this entity for the purpose of overseeing the disbursement of funds to the THA. It is a private offshore entity.

f. Arthur Ziev and/or Worth T. Blackwell and/or Raymond James & Associates, Inc.;

Arthur Ziev and Worth Blackwell were representatives of Raymond James & Associates, Inc. Can-Am worked with Raymond James to develop proposals for funding to the Port Authority in T&T. Can-Am and representatives of Raymond James also met with Petrotrin and submitted a funding proposal for the port upgrade in Trinidad.

g. Steven Vasak;

Mr. Vasak made a funding proposal that was rejected.

. . . .

Interrogatory No. 11:

Describe in detail the events that took place leading up to and at a meeting in London, England in or around April, 1999 between representatives of THA, representatives of Can-Am, and others, including who attended the meeting, the subject matter of the meeting and any decisions reached at the meeting.

Appendix T

Answer:

After the failure of the Bank of Montreal transaction, Mr. Dumas informed Ms. Sorsby that she needed to travel to Tobago to complete the Memorandum of Understanding and to introduce Mr. Hugh Hague to the THA. Mr. Dumas said the Chief Secretary wanted to discuss the Bower Cotton/ Nikea Proposal and meet Mr. Hague. Accordingly, Mr. Hague and Ms. Sorsby traveled to Tobago and met with Hochoy Charles, Allan Richards, Elton Bobb, and other members of the THA. Ms. Sorsby and Mr. Hague discussed all the requirements of the funding through the Bower Cotton/Nikea Proposal. Mr. Hague was Nikea's representative in North America. Mr. Hague informed the THA of the requirements of the proposal. Specifically, the Projects, and the ferry project, would first have to be approved by the trading program manager. If approved, the trading group could pledge $100 million if THA pledged 10%, or $10 million. In addition, Nikea was to be involved ir the EPC portion of the Projects. Mr. Hague further stated that a bank guarantee would be purchased to guarantee the funds invested by the THA.

Hochoy Charles assigned an office for Ms. Sorsby and Mr. Hague in the building where his business analyst Mr. Dumas had an office. Mr. Dumas, Ms. Sorsby, and Mr. Hague prepared together the memorandum of understanding while they were in Tobago at the request of Hochoy Charles.

In and around that time, several other proposals for funding were considered and rejected. For instance, Allan Richards informed Ms. Sorsby and Mr. Hague that he had

received a two-sentence letter from Jeffery Matz. Ms. Sorsby and Mr. Hague reviewed the letter and rejected it. Other proposals, such as proposals from the Lennox group, and the Cathay Group, were also reviewed. After reviewing several other proposals, Hochoy Charles stated he was ready to go to London to meet with the Bower Cotton Group.

While in London, two other groups came to the hotel where the THA representatives were staying to make funding proposals. One was presented by an attorney named Steven Vasak. Can-Am and Mr. Hague recommended that both of these proposals be rejected.

The meeting with respect to the Bower Cotton/Nikea Proposal took place in the offices of Bower Cotton. Those present for at least some portion of the meeting included Hochoy Charles, Allan Richards, Laura Lee Sorsby, Hugh Hague, Paul Simms, Roger Wyatt, another representative of the THA, and possibly others. The subject matter of the meeting was the Bower Cotton/Nikea Proposal. After the meeting, it was decided that the THA should pursue the Bower Cotton/Nikea Proposal.

APPENDIX U – LETTER FROM H. CHARLES DATED FEBRUARY 22, 1999

TOBAGO HOUSE OF ASSEMBLY

Office of the Chief Secretary
Tobago House of Assembly
Scarborough
Tobago

Fax No. :660-7653
Tel No.: 607063/64/65
E-mail: [illegible]

22nd February, 1999

Ms. Laura Lee Sorsby
C/o Janice J. Cleavinger
5341 Pagewood Lane
Houston
Texas 77056

Dear Ms. Sorsby,

The Tobago House of Assembly proposes to secure financing for identified critical development projects outlined in the Tobago Development Plan.

The projects being considered for financing are:

- THE SOUTH-WEST WASTEWATER TREATMENT PLANT
- THE BELMONT ROAD-HIGHWAY
- THE RICHMOND WATER SUPPLY AND TREATMENT FACILITIES

The Chief Secretary and Secretary for Finance and Planning, on behalf of the Executive Council, has agreed to appoint

Appendix U

you, Ms. Laura Lee Sorsby, CEO of Can-Am International L.L.C. as the financial consultant for the projects, with the authority and responsibility to oversee the financing process, on behalf of the Assembly.

This appointment is subject to the following terms:

1. All matters that require financial commitments by the Assembly shall be brought to the notice of the Tobago House of Assembly for agreement before any final commitments are made.

2. The Tobago House of Assembly or its appointed agents, shall be consistently notified of the developments in the loan processing and all related contingent conditions that may arise in due course of said process.

3. All schedules of payments and money management shall be determined and pursued only with the agreement of the Tobago House of Assembly.

4. Ms. Sorsby or an appropriately identified and appointed agent of CAN-AM must be available to the Tobago House of Assembly or its appointed agents, at all times.

5. This agency will be revoked in writing if Ms. Sorsby has failed to perform.

6. This agency agreement will remain in effect for six months, with an option of renewal, subject to the

Appendix U

Tobago House of Assembly's satisfaction with Ms. Laura-Lee Sorsby's performance and the continuance of its engagement with ongoing financing arranged by Can-Am International L.L.C.

The Tobago House of Assembly anticipates a productive relationship with CAN-AM International.

Yours,

s/ HCharles
Honourable Hochoy Charles
Chief Secretary
Tobago House of Assembly

APPENDIX V – IRREVOCABLE PAYMENT ORDER CONFIRMATION

IRREVOCABLE PAYMENT ORDER CONFIRMATION

This Irrevocable Pay Order Confirmation is subject to the terms and conditions as herein set forth and is a full recourse commercial commitment pay order instrument issued under penalty of perjury and shall be governed by the laws as set forth by the International Chamber of Commerce (ICC) Current Edition, rules of conciliation and arbitration (latest amendment)

Date *30th* April 1999

Reference THA/99/04/001

Subject Private Investment Placement(s) by The Tobago House of Assembly, Scarborough, Tobago, West Indies. (To include a first investment of US$10.00 Million and ANY AND ALL further investments as may occur.

Disbursement Schedules

Of the total value of the Transaction under the above Reference code payable to the beneficiaries named in the signed and engrossed schedules annexed hereto without protest or delay without deductions and free of taxes, bank charges and/or fees.

Schedule for the disbursement instructions which will be lodged with the Disbursement Account prior to commencement and acknowledged and confirmed.

Appendix V

1. A total of 10% (Ten Percent) of the net disbursable profits received by The Tobago House of Assembly or any Company on their behalf to facilitate the investment transaction, payable for each tranch to the disbursement account as per Appendix One.

We the Signatory undersigned hereby irrevocably guarantee with the full personal responsibility and authority that upon the closing and clearance of funds into the client disbursement account on each and every tranche in the above referenced transaction, we will instruct payment to the beneficiary named herein.

The Irrevocable Pay Order is valid upon commencement of the start of the transaction herein, and shall remain valid and enforceable for the full term of this transaction and shall apply to any and all terms and conditions as may be agreed between the parties, their shareholders and/or assignes [sic] pertaining/ relating to this transaction.

It is unconditional, transferable, assignable and divisible. The Reference code and all/any other identification codes, Banks, Fiduciary or Trusts, shall remain the same not being changed without written consent of all participants, including all renewals, extensions, rollovers, additions.

All parties hereby agree and guarantee not to circumvent any of the parties to this transaction for a period of three (3) years and renewable automatically for a further three (3) years and shall comply with all aspects of the non-circumvention ICC regulations and will apply [sic] with all aspects of the Pay Order from the date of execution of the aforementioned Pay Order.

Appendix V

Beneficiary___ Ref THA 99/04/001 Signatory s/ HCharles

This document binds all parties, their employees, associates, transfers, assigns and/or designees. Any facsimile of this document shall be deemed as legal and binding on all parties hereto and shall be so construed to any court of law regardless of State, nation or Province waiving all rights of immunity, regardless of whether diplomatic, sovereign or otherwise, which shall give this document full force and legal effect to true purpose and intent of this agreement as so construed by its signing parties.

Upon execution of this agreement, this Irrevocable Payment Order will be executed, following settlement and clearance of funds into the Disbursement Account for the first and subsequent tranches. Commission payment for each and every subsequent tranche thereafter shall be after settlement and clearance of funds into the Disbursement Account.

In the event this stipulation is not adhered to, the injured party shall be entitled to seek full remedial action and suitable indemnity as imposed by law. We hereby warrant, agree and guarantee with full personal and corporate responsibility and authority, to maintain this Irrevocable Pay Order with the Transaction Disbursement Account.

Beneficiaries:

Ms Laura Lcc Sorsby (Passport USA No: 132830279)
Can-Am International LLC
2530 Townhall Lane
Katy
Texas USA

Appendix V

s/ HCharles
Signed For and behalf [sic] of Tobago House of Assembly

Name: The Honourable Hochoy Charles

Title: Chief Secretary, Tobago House of Assembly

I hereby certify that on the 30th day of April 1999, the above named subscribers appeared in person and proved their identity to me by valid identification consisting of a passport, numbered and issued as specified above. Said parties executed this document signed and declared by themselves in my presence as the Irrevocable Payment Order and gave affirmation under the penalties of perjury that the facts and statements contained herein are true and correct and that they acknowledged that they freely and voluntarily executed the foregoing for the purposes specified herein.

Beneficiary____ Ref THA 99/04/001 Signatory s/ HCharles

Witnessed and Acknowledged by:

Name s/ Cewill E. Denoon
CEWILL E. DENOON
Commissioner of Affidavits
TOBAGO
10/5/99
[SEAL]

Appendix V

IRREVOCABLE PAYMENT ORDER CONFIRMATION

APPENDIX ONE

DISBURSEMENT ACCOUNT

TO:	)	LAURA LEE SORSBY
BANK:	)	
BRANCH:	)	To be advised
ACCOUNT NO:	)	
REFERENCE:	)	THA 99/04/001
SUBJECT:		Project Investment Contracts For The Tobago House of Assembly, Tobago, W.I.

s/ HCharles
For the Signatory
Name: The Honourable Hochoy Charles

s/ Laura Lee Sorsby
Confirmation of Acceptance by Laura Lee Sorsby

Beneficiary *s/* LS_ Ref THA 99/04/001

Signatory s/ HCharles

APPENDIX W – LETTER OF INTENT

Office of the Chief Secretary,
Tobago House of Assembly,
Jerningham Street,
Scarborough,
Tobago.

Fax. No. 639-5374
Tel. No. 639-2696
19th April, 1999

Mr Peter Newton
Programme Manager
36 Whitefriars Street
London
EC4Y8BH

Dear Sir

Letter of Intent - Reference Code - THA/9904-001

I, HOCHOY CHARLES, Chief Secretary and Secretary for Finance acting for and on behalf of the Tobago House of Assembly, bearing Trinidad and Tobago passport no *D000691* hereby confirm and attest with full legal and corporate responsibility, under penalty of prejury [sic], that I am ready, willing and able to enter $ Ten Million US dollars for participation into a private bank-secured investment programme, subject to my approval of the contract. I attest and warrant with full responsibility that the herein referred funds are good, clean, cleared funds that have been legitimately earned or obtained and of non-criminal origin, that the funds are free and clear of any liens or encunbrances [sic], that the funds are under myself without consent of any third party.

Appendix W

As evidence of my funds being available for participation in the initial amount of US $10 Million I have enclosed with this exclusive letter of intent and authority a copy of my latest bank statement for funds on deposit and/or a bank proof of funds letter.

I attest and warrant that I HOCHOY CHARLES, have bank-acknowledged signatory control, possession and title over these funds in this account, *95010035670* and signatory power for any agreements, that result from this proof of funds. I hereby authorize you and your banker to verify and confirm the herein referenced funds. My bank officer's name is Mr. Charles Mitchell[.] [H]is Tel. No. is 868-639-3485 and fax no. is 868-639-5857.

I herewith grant you the exclusive right to provide me with the best available investment program to facilitate the private placement of these funds. I attest that I have no other person(s) authorized to invest these specific funds into a similar program. It is understood and agreed that the ICC non-disclosure/non-circumvention rules apply to this letter of intent and the entire transaction and I hereby irrevocably agree to the current applicable standards of the International Chamber of Commerce.

I hereby confirm that neither the program administrator nor anyone on their behalf has solicited me in any way, and that no document received or that I will receive shall be deemed to be a solicitation. Additionally, I confirm that there has not been any offer to buy or sell securities and that there is not intended to be an offer to buy or sell securities. It is agreed that a facsimile or telefax copy of this letter of intent, the

proof of funds or any other associated documents are as valid and legal [sic] binding as the delivered original.

All statements herein are made under penalty of perjury.

HOCHOY CHARLES Chief Secretary and Secretary for Finance, passport No. *D000691* issued by Ministry of National Security of Trinidad and Tobago, expires on *26/2/2008* date

Notary

This instrument was acknowledged before me

s/ HCharles
s/ Hochoy Charles

This 30th day of April 1999
By C.E. Denoon, Commissioner [illegible]
Witnessed by my hand and official seal
Seal: My commission expires 31/12/99

APPENDIX X – LETTER OF EXCLUSIVITY

Office of the Chief Secretary,
Tobago House of Assembly,
Jerningham Street,
Scarborough,
Tobago.

Fax. No. 639-5374
Tel. No. 639-2696
19th April, 1999

Mr Peter Newton
Programme Manager
36 Whitefriars Street
London
EC4Y8BH

Dear Sir

Letter of Exclusivity - Reference Code - THA/9904-001

I, HOCHOY CHARLES, Chief Secretary and Secretary for Finance acting for and on behalf of the Tobago House of Assembly, bearing Trinidad and Tobago passport no *D000691* hereby with (herein after referred to as the affiant) full corporate, personal and legal responsibility under penalty of perjury of law, represent and attest that:

I, the undersigned, or any other principal party involved in this transaction, do not have any other party working or authorized to work with these funds allocated for the above mentioned reference code. Nor have any other party authorized to invest these funds, or have other funds from myself or the corporation placed with other parties for a similar investment program.

Appendix X

I, the undersigned, herewith grant the trade program manager/ administrator/facilitator exclusive right as our sole agent for 20 banking days from the above date, to enter these funds for me, or the corporation into the best available bank-secured investment program. Further I attest that I have sent cease and desist notices to any other intermediaries or trade groups that have had our paperwork in the past.

I, the undersigned understand, and I am fully aware that this transaction will be registered with a major world bank and/ or the Federal Reserve bank [sic] and the submitted private and confidential paperwork under reference code THA/9904-001 will be forwarded for the sole purpose of establishing necessary dossier due diligence and clearance for this transaction.

Facsimiles of this statement are deemed as legally bi. 'ing as delivered originals.

All statements herein are under penalty of perjury, so stated on this date the 19th day of April 1999, grantor:

HOCHOY CHARLES
Chief Secretary and Secretary for Finance, passport no. *D000691* issued by Ministry of National Security of Trinidad and Tobago, expires on *26/2/2008*

Notary

s/ HCharles

Appendix X

This instrument was acknowledged before me
This *30th* day of *April* 1999
By s/ C.E. Denoon, Commissioner of Affidavit [sic] in the
City of Scarborough, Trinidad and Tobago
Witnessed by my hand and official seal
Seal: My commission expires *31/12/99*

APPENDIX Y – PLAINTIFF'S AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Case No. H-01-3897

Hon. Judge Kenneth M. Hoyt

CAN-AM INTERNATIONAL, L.L.C.

Plaintiff,

v.

THE REPUBLIC OF TRINIDAD AND TOBAGO and the TOBAGO HOUSE OF ASSEMBLY

Defendants.

PLAINTIFF'S AMENDED COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Can-Am International, L.L.C. (hereinafter "CAN-AM"), plaintiff in this action, files this amended complaint:

I. PARTIES

1. Plaintiff Can-Am International, L.L.C. ("Can-Am" or "Plaintiff") is incorporated in the State of Texas and its principal place of business in Houston, Harris County Texas.

2. Defendant, the Republic of Trinidad and Tobago ("T&T"), is a sovereign nation. Defendant, the Tobago House of Assembly ("THA"), is a semi-autonomous political subdivision of the Republic of Trinidad & Tobago.

3. Defendants have appeared and answered in this matter.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction over this controversy pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C.A. §§ 1602 *et seq.* and § 1330(a).

5. Venue is proper under 28 U.S.C. § 1391(a), (b), & (f) because a substantial part of the events or omissions giving rise to this claim occurred in the Southern District of Texas.

III. FACTS

6. The Republic of Trinidad & Tobago is an island nation at the southern end of the Lesser Antilles chain off the coast of Venezuela that gained its independence from Great Britain in 1962. It consists of two major islands - Trinidad and Tobago - and is ruled by a central government in the city of Port of Spain on the island of Trinidad.

7. Tobago is governed by a semi-autonomous political subdivision of the central government called the Tobago House of Assembly.

8. In the late 1990s, THA contracted with Can-Am to create a financing mechanism to fund certain capital-improvement projects on the island of Tobago. In addition to providing financing arrangements, Can-Am was to help coordinate and oversee the projects.

9. Through substantial efforts by Can-Am, Can-Am was able to secure, as agreed, some $100 million in financing for Defendants' projects, in addition to numerous other financing programs.

10. Part of one of the agreed arrangements was that THA was obligated to contribute $10 million to the financing arrangement. However, despite its agreement to do so, THA thereafter refused and failed to provide this $10 million.

11. Because THA failed to comply with its obligations, the financing arrangement fell apart.

12. Even after the initial financing fell apart, THA continued to request Can-Am to work to find other financing mechanisms to accomplish the funding of projects in Tobago.

13. Can-Am complied with THA's repeated requests for alternative forms of financing, and presented various options to T&T through THA, and both T&T and THA unreasonably rejected the financing plans and demonstrated that they had no true intention to moving forward with any financing.

Appendix Y

COUNT I
BREACH OF CONTRACT

14. Paragraphs 1 through 13 are incorporated herein by reference.

15. THA contracted with Can-Am to obtain financing for certain capital improvement projects on Tobago. THA further contracted with Can-Am to provide services with respect to the coordination and overseeing of these improvement projects.

16. Can-Am performed its responsibilities under the contract, and/or stood ready to perform all continuing responsibilities.

17. THA and T&T breached the contract by failing to supply agreed upon funds and by refusing to perform under the contact.

18. As a direct and proximate consequence of THA's and/or T&T's breach, Can-Am has incurred and will continue to incur substantial damages.

COUNT II
FRAUD AND FRAUDULENT INDUCEMENT

19. Paragraphs 1 through 18 are incorporated herein by reference.

20. THA and T&T represented to Can-Am that it intended to provide $10 million in funding for the requested

financing structure arranged for by Can-Am and that it intended to proceed with the capital improvement projects with the participation of Can-Am. These representations were material. On information and belief, THA and/or T&T knew or should have known that they were false when made and THA and/or T&T made these representations with the intent that Can-Am rely on them. Can-Am reasonably relied on these representations to its detriment.

21. As a direct and proximate consequence of THA's and/or T&T's actions, Can-Am has incurred and will continue to incur substantial damages.

COUNT III
NEGLIGENT MISREPRESENTATION

22. Paragraphs 1 through 21 are incorporated herein by reference.

23. THA and/or T&T represented to Can-Am that it could provide $10 million in funding for the requested financing structure arranged for by Can-Am and that it could proceed with the capital improvement projects with the participation of Can- Am. On information and belief, these representations were material and guided Can-Am's actions in its business. The representations were false and THA and/or T&T did not exercise reasonable care of competence in making these representations. Can-Am justifiably relied on these representations to its detriment.

24. As a direct and proximate consequence of THA's and/or T&T's actions, Can-Am has incurred and will continue to incur substantial damages.

COUNT IV
PROMISSORY ESTOPPEL

25. Paragraphs 1 through 24 are incorporated herein by reference.

26. THA and T&T promised that it would provide $10 million in funding for the requested financing structure arranged for by Can-Am and that it would proceed with the capital improvement projects with the participation of Can-Am. Can-Am foreseeably relied on this promise to its detriment.

27. As a direct and proximate consequence of THA's and/or T&T's actions, Can-Am has incurred and will continue to incur substantial damages.

COUNT V
QUANTUM MERUIT

28. Paragraphs 1 through 27 are incorporated herein by reference.

29. Plaintiff Can-Am is engaged in the practice of financial consulting. On or about March 27, 1997, defendant THA and Plaintiff contracted with Can-Am to obtain financing for certain capital improvement projects on Tobago. THA further contracted with Can-Am to provide services with respect to the coordination and overseeing of these improvement projects.

30. Can-Am performed its responsibilities under the contract to include securing, as agreed, some $100 million in financing for the projects. As a direct result of Can-Am's rendition of the services, a benefit was conferred on the defendants in that they obtained options for financing for projects as a result of Can-Am's work.

31. THA and/or T&T have accepted the benefits of Can-Am's services, but have refused to pay for them. Additionally, THA and/or T&T represented and promised to Can-Am that it would provide $10 million in funding for the requested financing structure arranged for by Can-Am and that it intended to proceed with the capital improvements projects with the participation of Can-Am.

32. In addition, after the initial financing structure fell through, THA and/or T&T continued to request Can-Am to find alternative forms of financing. Can-Am complied and presented several forms of alternative financing. THA and/or T&T continued requesting additional work by Can-Am, but unreasonably refused other financing options demonstrating that they had no intention to fulfill their obligations to Can-Am.

33. THA and/or T&T will be unjustly enriched in the amount claimed by Can-Am if allowed to retain the benefit conferred them without payment for the reasonable value of the services provided by Can-Am described above. T&T and THA knew that Can-Am's services had value and that Can-Am expected payment for that value. As a result of THA and/or T&T's failure to perform, Can-Am has been damaged and is entitled to recover the

reasonable value of services provided to THA and/or T&T, together with the expenses incurred on Defendants' behalf.

34. On June 18, 2001, by letter from Can-Am's legal counsel, Can-Am presented its claim to be paid for the services requested by THA and/or T&T as described above and for payment by letter dispatched to THA and T&T demanding settlement of the damages and losses that Can-Am and its related entities have suffered as a result of THA and/or T&T's wrongful conduct. As of the filing of the complaint, payment for the just amount owed has not been tendered. As a result of THA and T&T's failure to pay the claim, Can-Am has been required to retain legal counsel to bring this suit.

IV. ATTORNEYS FEES

35. As a result of the breach of contract and tortious actions of THA and T&T, Can-Am has been required to retain counsel to represent it in this action. Accordingly, Can-Am seeks recovery of its reasonable and necessary attorney's fees as provided by law.

V. PRAYER FOR RELIEF

WHEREFORE, premises considered, Plaintiff respectfully seeks recompense against the THA and T&T for its actual and consequential damages proximately caused by THA's and T&T's wrongful actions. The elements of these damages, some of which are stated in the alternative, include, but are not limited to, the following:

a. Plaintiffs expenses incurred in arranging financing for, and in pursuing and coordinating, this transaction;

b. The value of Plaintiff's lost time in pursuing this transaction;

c. The value of the opportunities lost by Plaintiff because its resources were dedicated to this transaction;

d. The fees that were to be generated by Plaintiff deriving from the financing arranged by Plaintiff;

e. The fees that were to be generated by Plaintiff from Plaintiff's role in coordination and overseeing the projects;

f. Reasonable and necessary attorney's fees; and

g. Costs of Court.

In addition, Plaintiff respectfully prays for all such other and other [sic] and further relief to which it may show itself justly entitled. Plaintiff respectfully reserves the right to amend the complaint, as more facts become known.

Appendix Y

Respectfully submitted,

BURROW & PARROTT, L.L.P.

s/ Alice Oliver-Parrott
Alice Oliver-Parrott
ATTORNEY-IN-CHARGE
State Bar No. 20210800
Fed. I.D. 5644
Maria Teresa Arguindegui
State Bar No. 01301765
Fed. I.D. 13905
David H. Burrow
State Bar No. 03468000
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1301 McKinney, Suite 3500
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STOREY, MOORE
& MCCALLY, P.C.
Daryl L. Moore
State Bar No. 14324720
Fed. I.D. 12356
1005 Heights Blvd.
Telephone: (713) 529-0048
Telecopier: (713) 529-2498

ATTORNEYS FOR PLAINTIFF
CAN-AM INTERNATIONAL L.L.C.

APPENDIX Z – EXCERPTS FROM DEPOSITION OF MICHAEL AMBROSE CONLON TAKEN OCTOBER 3, 2003

Page 8

Q. Just as of May 1st 2000, the only two partners at the Bower Cotton Partnership were yourself and Mr. Simms; is that correct?

A. That is correct.

Q. Today, October 3rd 2003, is the Bower Cotton partnership still in existence?

A. Yes, it is.

Q. Are you employed by them, sir?

A. No. Actually I am a partner.

Q. You are a partner, yes, sir. How many partners are there?

A. There are two equity partners and one salaried partner.

Q. Who is the other equity partner?

A. Roger Harris.

Q. Is Mr. Simms a partner?

A. No. He hasn't been a partner since 19th February 2002.

Appendix Z

Q. What happened on February 19th, 2002?

A. On 18th February the Law Society intervened into his practice and on 19th February we told him he could no longer be a partner because he could not practice as a partner; so

Page 9

since that time he has had no involvement in the firm.

Q. The Law Society intervened. What does that mean, sir?

A. Well, they come in and stop a solicitor from practising. They actually kind of seize all his files, all his client account moneys, and he cannot practice. Obviously, there's got to be very serious concerns on their behalf for them to do that. It is draconian, so they obviously suspected him of something quite terrible. They suspect that he has been involved in investment scams, advance fee frauds, and money laundering. I believe his case is coming before the disciplinary body in November, but I do not know whether that is correct or not.

Q. As of February 19th 2002, was Mr. Simms was [sic] asked to leave the partnership?

A. He could not practice. The partnership between myself, Roger Harris and himself kind of dissolved on that date. That happens under the provisions of the Solicitors Act because you've got to be a solicitor to be in partnership within a firm of solicitors.

APPENDIX AA – AFFIDAVIT OF A. PASCAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Case No. H-01-3897

Hon Judge Kenneth M. Hoyt

CAN-AM INTERNATIONAL, L.L.C.

Plaintiff,

v.

THE REPUBLIC OF TRINIDAD AND TOBAGO and the TOBAGO HOUSE OF ASSEMBLY

Defendants.

AFFIDAVIT OF ALVIN PASCAL

I, Alvin Pascal, hereby depose and state under the pains and penalties of perjury:

1. I am an Attorney-At-Law licensed to practice law in the Republic of Trinidad and Tobago.

2. I am employed by The Tobago House of Assembly, Administrative Complex, Calder Hall, Tobago, Trinidad and Tobago.

3. I have no personal knowledge of the facts in the amended complaint in the referenced matter.

4. The law of the Republic of Trinidad and Tobago is based on English common law.

5. The law of the Republic of Trinidad and Tobago recognizes a civil claim for breach of contract. There is no formal requirement with respect to contract establishment, in other words a contract can accrue by conduct or by virtue of an exchange of promises. In determining whether a contract was reached there must be (a) an offer and acceptance (b) consideration (c) intention to create legal relations (d) privity between the parties.

5.1 *Offer and Acceptance*

In the ***Law of Contract Chesire***,**[sic]** ***Fifoot and Furmston's pg 30-31*** it is stated that "An offer capable of being converted into agreement by acceptance must consist of a definite promise to be bound provided that certain specified terms are accepted..." It must be noted that the offeree must display a readiness to undertake certain obligations leaving the offeree to either accept or decline the offer.

An offer in order to result in a binding contract must be accepted. On pg 37 in ***Law of Contract Cheshire, Fifoot and Furmston pg 37*** - it states that 'whether there has been an acceptance by one party of an offer made to him by the other party be collected from the words or documents that have passed between them or may be inferred from there

[sic] conduct.' However as a minimum the law requires that the acceptance conform to every material particularity with the offer. See ***pg 38 Law of Contract Cheshire, Fifoot and Furmston***. If what purports to be an offer fails the test with respect to finality or conclusiveness the effect of the so called acceptance is to destroy the original offer see ***Harvey vs Facey [1893] A.C 552***.

5.2 *Communication of Acceptance*

Assuming offer and acceptance the law requires the acceptance be communicated before it can be accepted see ***Felthouse vs Bindley Common Pleas (1862) 11 C B***.

5.3 *Consideration*

Consideration can be viewed as a body of technical rules, which define the circumstances in which the law of contract will allow the enforcement of a promise. Thus if there is no *quid pro quo* the law says that contract law will not allow for the enforcement of gifts — this type of arrangement is *nudum pactum*.

5.4 *Rules of Consideration*

1. *Consideration might be executed or executory but not past.* Consideration is executed in a situation where one party has fully performed his side of the bargain. Consideration is executory where all the rights and obligations under the contract relate to rights and obligations in the future. However, past consideration is not good consideration. Past consideration occurs where

there is no causal relationship between relative promises. ***See Pg 76-77 Law of Contract – Cheshire, Fifoot and Furmston.*** It must be noted that the law relating to past consideration is subject to the rule in ***Lampleigh vs Brathwait Common Bench (1615) Hob 105*** which states that in certain circumstances the court can find that there was an implied promise to pay. This rule was confirmed in ***Re Casey's Patents, Stewart vs Casey (1892) 1 Ch. 104.***

2. *A contract need not be adequate but it must be sufficient. Adequacy* relates to the relative value of the promises, which are exchanged whilst *sufficiency* speaks to the legal requirement of validity.

   Adequacy The courts will not inquire into the adequacy of consideration. By this is meant that they will not seek to measure the comparative value of the defendant's promise and of the act or promise given by the plaintiff in exchange for it nor will the court denounce the agreement because it seems to be unfair. ***See pg 84 Law of Contract Cheshire, Fifoot and Furmston's, Thomas vs Thomas (1842) 2 QB 851*** Sufficiency of Consideration – The question in the sufficiency rule is whether the party seeking enforcement has a basis for its claim. The law of contract states that where there is a preexisting duty a plaintiff is not entitled to claim in respect of a promise to compensate him for the performance of that duty. Further by statute certain persons are expected to perform certain functions. **See Stilk vs Myrick (1809) 2 Camp 317; Williams vs Roffey Brothers & Nicholls Ltd. (1990) 1 ALL ER 512.**

3. *Consideration must move from the Promisee* This rule states that to enforce a promise the person must show that he has given value for the promise. ***See pg 79 Law of Contract Cheshire, Fifoot and Furmston, Price vs Easton (1833) 4 B & AD 433.***

5.5 *Intention to Create Legal Relations*

This rule was created to limit the enforceability of the contract so that the court will only enforce promises, which are intended to create legal relations. The cases in this area may be divided into two classes (a) domestic arrangements and (b) commercial arrangements.

Domestic Arrangements Where there are social, family or domestic arrangements there is a presumption that there is no intention to create legal relations.

Commercial Arrangements Where the agreement is a commercial one there is a presumption that the parties intended to create legal relations. ***See pg 115 Law of Contract – Cheshire, Fifoot and Furmston's, Rose and Frank Company vs Crompton Brothers (1923) 2 KB 261.***

5.6 *Privity of Contract*

The privity rule states that only parties to a contract can sue or be sued in respect of that contract. ***See pg 462 Law of Contract — Cheshire, Fifoot and Furmston's, Tweddle vs Atkinson (1861) 1 B&S 393.***

Once these elements have been shown to exist then the non performance/ mal performance of a term of the contract by a party will result in a breach of that contract.

6. Among the defences to a claim for breach of contract are (a) Illegality (b) Frustration / Impossibility of Performance (c) Mistake (d) Misrepresentation and (e) Fraud.

6.1 ILLEGALITY

There are two basic kinds of illegal contracts (a) those which are contrary to public policy and (b) those which are contrary to statute.

1. *Contracts contrary to public policy*

Contracts, which are contrary to public policy, may be divided into those cases where the contract is criminal or immoral or where the contract or some provision therein has no criminal intent but is otherwise contrary to public policy. ***See Goodson vs Goodinson (1954) 2 QBD 1181, Rahine Bacchus vs Albain***

2. *Statutory Illegality*

A statute may affect a contract by either prohibiting the formation of the agreement or by prohibiting a certain method of performing the agreement or it may prohibit some act which is committed by one party in the course of performing the contract. ***See pg 362-385 Law of Contract - Cheshire, Fifoot and Furmston's Hughes vs Asset Managers plc (1995) 3 ALL ER 669.***

Appendix AA

6.2 FRUSTRATION/IMPOSSIBILITY OF PERFORMANCE

There are three broad areas in which frustration operates (a) Supervening Impossibility (b)Supervening Illegality (c) Commercial Impracticability.

1. *Supervening Impossibility* arises in several cases for example the destruction of the subject matter or the unavailability of the subject matter or one of the parties to the contract for a significant period of time. ***See Jackson vs Union Marine Insurance Co. Ltd. (1874) LR 10 CP 125.***

   Another cause of frustration is the non occurrence of some event which must be reasonably regarded as the basis of the. contract. See ***Krell vs Henry (1903) 2 KB 740, Herne Bay Steam Boat Company vs Hutton (1903) 2 KB 683.***

2. *Supervening Illegality* occurs where the contract is legal when formed however because of a change in law or its administration or a change in public policy frequently because of the out break of war, the performance of which is now unlawful.

3. *Commercial Impracticability* occurs where performance of the contracts is still literally possible but some other purpose which was to be achieved by the contract cannot now be had. ***Krell vs Henry (1903) 2 KB 740, Herne Bay Steam Boat vs Hutton (1903) 2 KB 683.***

Appendix AA

6.7 MISTAKE

From the case law it appears that at least one type of mistake will readily afford relief more than any other and these cases may be grouped under the heading of initial impossibility and mistake as to the subject matter of the contract. See ***Griffith vs Brymer (1903) 19 TLR 434, Coutrier vs Hastie (1856) 5 HLC 673, McRae vs The Commonwealth Disposals Commission 84 CLR 377, Bell vs Lever Brothers Limited (1932) AC 161.***

6.8 MISREPRESENTATION

A plea of misrepresentation can either be used a cause of action or as a defence.

In Trinidad and Tobago the law on Misrepresentation is based on the ***Misrepresentation Act of NO. 12 of 1995***.

In order to establish a claim of misrepresentation the person pleading misrepresentation must show that he was *induced* into entering the contract on the stated terms by his *reasonable reliance* on some *untrue representation* of a *material nature* by the other party to the contract. It must be noted here that the representation must not necessarily be one of fact. Under the statute there is no requirement that an oral or written statement be made and in fact a misrepresentation may occur through the conduct of the parties. There may also be a misrepresentation if there was a failure to correct a statement, which was true at the time it was made but which subsequently became untrue at the time of entry into the contract.

Appendix AA

6.9 FRAUD

In ***Derry vs Peek (1889) 14 App Cases 337*** it was established that an absence of honest belief was necessary to constitute fraud. Lord Hershell is [sic] the said case went on to define fraud as a false statement made (a) knowingly or (2) without belief in its truth or (c) recklessly, careless whether it be true or false. It should be noted that the learned judge did admit that this definition of fraud overlaps with the definition of fraudulent misrepresentation which is defined as a representation which when made the representor did not honestly believe to be true.

7. The law of the Republic of Trinidad and Tobago does not recognize a civil claim for fraud in the inducement but a claim in fraudulent misrepresentation may be supported.

8. The law of the Republic of Trinidad end Tobago recognizes the doctrine of Promissory Estoppel.

   According to ***Hanbury and Martin in Modern Equity pg 884-885***, 'Where by words or conduct a person makes an unambiguous representation as to his future conduct intending the representation to be relied on and to affect the legal relations between the parties and the representee alters his position in reliance on it, the representor will be unable to act inconsistently with the representation if by so doing the representee would be prejudiced. ***See Central London Property Trust Limited vs High Trees House Limited (1947) KB 130, Hughes vs Metropolitan Railway Company (1877) 2 App Cases 439 at 448 Lord Cairns judgement.***

Appendix AA

9. The law of the Republic of Trinidad and Tobago recognizes the doctrine of *quantum meruit.*

A claim in quantum meruit may be either contractual or quasi contractual. It is quasi contractual is [sic] made where the plaintiff is not relying on the contract but is claiming the value of a benefit conferred on him by the defendant who had the option to refuse but chose to accept it. ***See pg 685 Law of Contract Cheshire, Fifoot and Furmston's, Craven Ellis vs Canon's Limited (1936) 2 KB 403.***

A claim in quantum meruit is contractual where a contract exists but no price has been fixed for the plaintiff's services or other consideration supplied by him (***See Powell vs Baun (1945) 1 ALL ER 484***) or where the original contract was replaced by a new one and the plaintiff is now claiming payment for work done or goods supplied under this substituted contract. ***See pg 685 Law of Contract Cheshire, Fifoot and Furmston's, Steven vs Bromley and Son (1919 2 KB 722).***

s/ Alvin Pascal

Sworn to by Alvin Pascal
At *#1 Bacolet Street, Scarborough, Tobago*
This *31st* day of *March*, 2004.
Before me,
s/ Jocelyn E.
Notary Public
[SEAL]